Major Events and Policy Issues in EU Competition Law 2019–2020: Part 2

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Cartels; Character merchandising; Competition law; Competition policy; Digital technology; Energy; EU law; Internet of things; Pricing

Abstract

John Ratliff and his colleagues set out the second part of their annual review of major events in EU Competition law in 2019–2020, dealing with various European Commission decisions under art.101 TFEU on cartels, and film and character merchandising and territorial restrictions (NBC Universal, Sanrio, Meliá Hotels International). They also summarise art.102 TFEU cases such as Aspen (on excessive pricing) and Broadcom (on exclusivity/bundling); on energy (such as Transgaz and Bulgarian Energy Holding), and on digital/hi-tech issues (two cases involving Qualcomm; one on exclusivity payments, the other predatory pricing). Then, they outline the EC's sectoral review on The Internet of Things; and selected policy issues including recent EC initiatives for digital markets (including a "Digital Markets Act" and a "Digital Services Act"), and on competition law and foreign subsidies.

This is the second and final part of the overview of "Major Events and Policy Issues in EU Competition Law, 2019–2020", following on from Part 1 published in last month's journal.[1] The reference period is from November 2019 until the end of October 2020.[2]

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[1] "TFEU" is the abbreviation for Treaty on the Functioning of the European Union; "TEU" is Treaty on European Union; "EC" for European Commission (not European Community, as before the Lisbon Treaty); "GC" is the abbreviation for General Court, "ECJ" for the European Court of Justice and "CJEU" for the overall Court of Justice of the European Union; "AG" for Advocate-General; "NCA" is the abbreviation for National Competition Authority; "SO" is the abbreviation for Statement of Objections; "BE" is the abbreviation for Block Exemption; "Article 27(4) Notice" refers to the EC's Communications under that Article of Regulation 1/2003 [2003] OJ L1/1. References to the "ECHR" are to the European Convention of Human Rights and references to the "CFR" are to the EU Charter of Fundamental Rights.

[2] The views expressed in this paper are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP. References to the EC's website are to DG Competition's specific competition page, available at: *http://ec.europa.eu/competition/index_en.html* [Accessed 3 February 2021]. References to "I.C.C.L.R." are to previous articles in the series, "Major Events and Policy Issues in EU Competition Law", published in the *International Company and Commercial Law Review*.

The first part of the article summarised EU legislative developments, European Court judgments on general issues, cartel appeals, inspections and rejections of complaints.

This second part summarises European Commission (EC) Decisions on cartels and arts 101 and 102 TFEU cases, the EC's sectoral inquiry on the Internet of Things, and selected policy issues including EC initiatives as regards digital markets, and competition law and foreign subsidies.

European Commission Decisions

Box 10

- **Cartels**
  - New
    - Only *ethylene purchasers* and *car parts suppliers*
  - Old
    - *Trucks (Scania)* and *Cathode Ray Tubes* decisions published

Article 101 TFEU Cartels—New

Box 11

New Cartel Fines

(November 2019 to October 2020)

Total Fines		**Highest company fine(s)**	
Ethylene Producers	*€260.4 million*	*Clariant*	*€155.8 million*
Car Parts (closure systems)	*€18.2 million*	*Kiekert*	*€15 million*
TOTAL	**€278.6 million**		

Ethylene Purchasers

In July 2020, the EC fined three ethylene producers a total of €260 million, following a settlement procedure, for having colluded to buy ethylene at the lowest price possible.[3]

The EC noted that since the purchase price for ethylene is very volatile, purchasers usually buy ethylene under supply agreements. Those agreements refer to a pricing formula, often including a so-called Monthly Contract Price (MCP), which is an industry price reference resulting from individual negotiations between ethylene buyers and sellers, published by specialised market information providers.

In order to establish an ethylene MCP for the upcoming month, two separate identical bilateral agreements (also called "settlements") between two different pairs of suppliers and buyers have to be reached (a so-called "2+2 rule"). After a pair of a supplier and a buyer has reached an agreement on the price for the following month, they communicate it to the private and independent reporting

[3] With thanks to Katrin Guéna. Case AT.40410—*Ethylene*. EC Press Release IP/20/1348, 14 July 2020.

agencies. After another pair of a buyer and a supplier settles at the identical price, this price becomes the MCP for the following month via a publication by these agencies.

The EC found that the objective of the companies' conduct was to jointly influence the monthly MCP negotiations with ethylene sellers to their advantage (i.e. by reducing it), through the exchange of price-related information on their negotiations with ethylene sellers.

The cartel lasted from December 2011 to March 2017. It covered the territories of Belgium, France, Germany and the Netherlands.

To establish the amount of the fine, the EC used the value of purchases instead of the sales' value, increased by 10% (as in the *Battery Recycling* case)[4] since the value was artificially lowered as a result of the parties' anti-competitive behaviour.

The EC imposed the highest fine on Clariant, amounting to €155.8 million. The EC noted that Clariant had been sanctioned previously for a similar infringement. Celanese received a fine of €82.3 million and Orbia €22.4 million. Westlake was not fined because it revealed the cartel.

The participants' fines were reduced by 10% since they agreed to settle the case, and by 20–45% for their cooperation in the investigation.

Interestingly, the EC extended the payment date of the fines from three to six months to take account of eventual liquidity problems incurred by the companies due to the economic consequences of the COVID-19 pandemic.

Car Parts Suppliers

In September 2020, the EC adopted a decision fining Brose and Kiekert, two German producers of closure systems used in cars, €18.2 million. The Canadian supplier Magna was not fined because it revealed the two cartels concerned.[5]

The EC noted that Magna coordinated pricing behaviour and exchanged sensitive information: (i) with Brose for the supply of door modules and window regulators used for certain Daimler models; and (ii) with Kiekert for the supply of latches and strikers produced for several BMW and Daimler cars. The coordination took place through bilateral meetings, telephone calls and email exchanges. It lasted for the first infringement from August 2010 to February 2011, and for the second infringement from June 2009 to May 2012.

All the companies admitted their participation in the cartels and decided to settle. In setting the fines, the EC therefore applied a 10% reduction. The EC also reduced both fines to take account of the parties' cooperation. The EC granted partial immunity to Kiekert for the infringement between June 2009 and October 2010, after Kiekert submitted evidence for that period. As a result, Kiekert received an additional fine reduction of 40% and Brose of 35%.

Overall, therefore, Kiekert was fined some €15 million and Brose €3.2 million.

[4] Case AT.40018—*Car battery recycling*. EC Press Release IP/17/245, 8 February 2017.
[5] With thanks to Katrin Guéna. Case AT.40299—*Closure Systems*. EC Press Release IP/20/1774, 29 September 2020.

Other

In November 2019, the EC announced that it was opening an investigation into *possible collusion by two French retailers in a purchasing alliance*.[6] The issues raised are outlined in the French supermarkets inspection judgments noted in Part 1 of this article, in which it is suggested that the EC has not pursued (at least some parts of) the case.[7] There has also been an announcement by the French Competition Authority that it has accepted proposals by Casino, Auchan, Metro and Schiever to limit their cooperation in purchasing groups.[8]

Cartels—Old

Scania (Trucks cartel)

In September 2017, the EC adopted a decision fining Scania, a major Swedish manufacturer of heavy trucks and buses, €881 million for its participation in the *Trucks cartel*.[9] The EC published a provisional non-confidential version of this decision in June 2020, in which a great deal is still redacted pending resolution of confidentiality claims.

It may be recalled that the Trucks cartel consisted of agreements and/or concerted practices on price and other terms for the production of "medium trucks" (between 6 to 16 tonnes) and "heavy trucks" (over 16 tonnes). Six undertakings were found to have participated in the cartel, five of which were the subject of a settlement decision in July 2016 (the "Settlement Decision"). Scania, however, did not put forward a settlement proposal.

The main points of interest on the EC's Scania decision are as follows.

First, as regards Scania's behaviour, the EC found that the agreement and concerted practices lasted from January 1997 until January 2011. The EC noted that, although there is a high degree of transparency on the production of trucks, gross prices or upcoming changes to gross prices for trucks are not published and are not available through freely accessible public sources.[10]

However, the participants in the cartel agreed on gross price increases. They also agreed on the timing for the introduction of emission technologies to comply with stricter European standards and the passing on of the related costs to customers in the EEA.[11] They also exchanged commercially sensitive information.

The EC found evidence of Scania's participation in anti-competitive meetings in Germany and across Europe, discussing these topics.[12]

Scania's lawyers challenged various issues, including the credibility of handwritten notes of meetings, and stated that Scania's representatives did not

[6] Case AT.40466—*Alliance Casino & Intermarché*. EC Press Release IP/19/6216, 4 November 2019.

[7] See *Les Mousquetaires and ITM Entreprises v Commission* (T-255/17) EU:T:2020:460 at [260] and [275].

[8] See Reuters, 22 October 2020. Also see Autorité de la concurrence, "Purchasing offices: the Autorité accepts the commitments proposed by Casino, Auchan, Metro and Schiever" (22 October 2020) available at: *https://www.autoritedelaconcurrence.fr/en/press-release/purchasing-offices-autorite-accepts-commitments-proposed-casino-auchan-metro-and* [Accessed 3 February 2021].

[9] With thanks to Geoffroy Barthet. Case AT.39824—*Trucks*, EC decision of 27 September 2017. The EC's summary is in [2020] OJ C216/9.

[10] See *Trucks*, EC decision at [33] and [241].

[11] See *Trucks*, EC decision at [2,] [75]–[76] and [207].

[12] *Trucks*, EC decision at [98]–[190].

recall discussing prices. However these claims were rejected by the EC,[13] which concluded that Scania regularly participated in the anti-competitive contacts throughout the entire infringement period and took part in the overall agreements or concerted practices, or both.[14]

Second, the EC considered that the agreement and concerted practices constituted a single and continuous infringement. According to the EC, the parties pursued a single anti-competitive aim, as shown, inter alia, by the fact that the contacts related to the same products and the same competitors, and by the nature of the information exchanged.[15] In addition, Scania was aware of the scope and characteristics of the network of collusive contacts and intended to contribute to the arrangements.[16]

Third, the EC found that trade between Member States was affected not only because trucks were traded between EU Member States,[17] and the collusion on price concerned trucks sold in the EEA, but also because the timing for applying EU environment standards covered the entire territory of the EEA.[18]

Fourth, Scania alleged that the EC was biased and had breached the presumption of innocence and its rights of the defence as a result of the adoption of the Settlement Decision. However, based on the *Timab* case,[19] the EC considered that it was entitled to conduct its investigation under the settlement procedure with respect to certain parties, and under the standard procedure with respect to others, and that there is no restriction on the individual timing of each procedure or a requirement that the relevant decisions be adopted simultaneously.[20]

The EC added that it is sufficient that non-settling parties are heard with respect to the SO and that a decision is adopted and addressed to them individually. The EC considered that Scania had been given an opportunity to express its views on the objections raised.

Fifth, Scania argued that it was heard only after the Settlement Decision was adopted and that it did not have access to the same information as the EC. The EC's response was that the Settlement Decision had no effect on Scania which had chosen not to pursue the settlement procedure and was able to exercise its rights of defence both before and after the adoption of that decision.[21] The EC also emphasised that Scania was granted all necessary information after the SO. It was also given the opportunity to reply to the objections and to comment on the fining methodology.[22]

Sixth, Scania claimed that the public disclosure, in the EC's Press Release on the Settlement Decision, that the investigation was continuing against it showed that the EC prejudged its liability before it could exercise its rights of defence.

The EC disagreed, considering that its Press Release on the decision concerning the settling parties had no effect on Scania's ability to effectively exercise its rights

[13] *Trucks*, EC decision at [226]-[228].
[14] *Trucks*, EC decision at [229].
[15] *Trucks*, EC decision at [315]-[330].
[16] *Trucks*, EC decision at [331]-[334].
[17] *Trucks*, EC decision at [355].
[18] *Trucks*, EC decision at [356].
[19] *Timab Industries v European Commission* (T-456/10), Judgment of 20 May 2015, EU:T:2015:296; [2015] 5 C.M.L.R. 1.
[20] *Trucks*, EC decision at [369].
[21] *Trucks*, EC decision at [368].
[22] *Trucks*, EC decision at [379].

of defence.[23] The EC recalled that the Settlement Decision had made no finding against Scania, which is expressly stated in the Press Release.[24] Finally, the fact that the investigation continued against Scania merely resulted from the application of the standard cartel procedure as chosen by Scania.[25]

Scania has appealed and there was a hearing in June 2020.

Cathode Ray Tubes

In November 2019, the EC published on its website its decision from December 2012, in which the EC imposed a total fine of €1.47 billion on seven groups of companies for their participation in one or both of two distinct cartels in the sector of cathode ray tubes (CRT).[26] In the meantime, there has been much related litigation.[27]

It may be recalled that CRT is an “evacuated glass envelope containing an electron gun and a fluorescent screen”. There are two types: colour display tubes (CDTs), which are used in computer monitors, and colour picture tubes (CPTs), which are used for colour televisions. Since early 2000, the CRT technology was gradually replaced by LCD and plasma displays.

The main points on the decision are as follows:

First, the EC found that the CDT cartel lasted from October 1996 to March 2006.[28] It mainly focussed on coordinated output restrictions, such as shutting down entire production lines, which were closely monitored through visits to factories in order to ensure compliance. Other anti-competitive practices included: price-fixing, market sharing and customer allocation, and exchanges of commercially sensitive information on past and future pricing, capacities, output and demand.[29]

Participants would meet on a regular basis. Multilateral meetings would take place at three levels: (i) the top executive level (the “green meetings”); (ii) the management level (the “glass” meetings); and (iii) the working level meetings. There were also frequent bilateral meetings.[30]

The EC stated that originally, the CDT cartel participants were Chunghwa Picture Tubes and its subsidiaries (Chunghwa), Samsung SDI and its subsidiaries (Samsung), Koninklijke Philips Electronics (Philips), LG Electronics (LGE) and “a CDT producer”[31] which is anonymous in the decision. Later, in 2001, a joint

[23] *Trucks*, EC decision at [381].
[24] *Trucks*, EC decision at [382].
[25] *Trucks*, EC decision at [383].
[26] With thanks to Marilena Nteve. EC Decision of 5 December 2012 relating to a proceeding under art.101 TFEU and art.53 EEA (COMP/39437—*TV and Computer Monitor Tubes*). The EC’s summary is in [2013] OJ C303/13. EC Press Release IP/12/1317, 5 December 2012.
[27] See e.g. *Toshiba Corp v European Commission* (C-623/15 P) Judgment of 18 January 2017, EU:C:2017:21; [2017] 4 C.M.L.R. 17; and *Samsung SDI Co Ltd v European Commission* (C-615/15 P), EU:C:2017:190; [2017] 4 C.M.L.R. 27, Judgment of 9 March 2017; see also John Ratliff “Major Events and Policy Issues in EU Competition Law 2016-2017: Part 2” [2018] I.C.C.L.R. 143, 177–181.
[28] *TV and Computer Monitor Tubes* EC summary, [2013] OJ C303/13 at [108].
[29] *TV and Computer Monitor Tubes* EC summary, [2013] OJ C303/13 at [109]–[112].
[30] *TV and Computer Monitor Tubes* EC summary, [2013] OJ C303/13 at [113]–[116].
[31] The EC decision explains that there were three other unnamed producers for which it had evidence of an infringement until June 2000, but not beyond. The EC therefore stated that it would not systematically refer to them on the CDT arrangements. *TV and Computer Monitor Tubes* EC summary, [2013] OJ C303/13 at [118].

venture between Philips and LGE was formed. The anonymous CDT producer ended its participation in 2002 due to financial difficulties.[32]

Second, the EC found that the CPT cartel lasted from December 1997 until November 2006.[33] It mainly focused on price-fixing agreements on target or bottom prices for various CPT dimensions and sizes. The cartel participants attempted to maintain a price gap between identical products sold in Europe and in Asia, and the pricing agreements were closely monitored. Other anti-competitive practices included: market share allocation, coordinated output restrictions and exchange of commercially sensitive information.[34]

Initially, CPTs were discussed in meetings together with CDTs. In 1998, CPT "glass" meetings were established, which were less structured and frequent. The core participants were originally Chunghwa, Samsung, LGE, and two more anonymous CPT producers. By 2003, Panasonic Corporation (Panasonic),[35] Toshiba Corporation (Toshiba) and Technicolor had joined. In 2003, a joint venture between MT Picture Display, Panasonic and Toshiba (MTPD) was formed.[36]

Around 2002/2003, the "SML" meetings (between Samsung, MTPD and LGE) for medium- and large-sized CPTs, and "ASEAN" meetings (Southeast Asia) for small- and medium-sized CPTs were established. These meetings took place in Asia. There were also separate meetings in Europe. The EC found that, even though these meetings in Asia and in Europe were not subject to a joint central organisation, they were interconnected. Subsidiaries from the same undertakings attended meetings with competitors in both Europe and Asia. Also, the pricing discussions were closely connected.[37]

Third, the EC found that it had jurisdiction to apply art.101 TFEU. As regards undertakings established outside the EU, the EC recalled that on *Woodpulp*,[38] the decisive factor is whether the agreement, decision or concerted practice was implemented within the EU.

Some of the cartel participants argued that the SML and ASEAN meetings did not restrict competition within the internal market, and that there were import barriers.[39] However, the EC noted that, even if the main focus of some arrangements would not have been Europe, Europe was in many ways affected by the cartel arrangements.

There was also a clear interconnection between the European and Asian pricing discussions, so the EC considered it artificial to split the SML and ASEAN meetings from other former or simultaneous CPT cartel contacts. The EC therefore found that the cartel contacts had an "immediate, foreseeable and substantial effect" in the EU in the sense of the *Gencor*[40] case.[41]

[32] *TV and Computer Monitor Tubes* EC summary, [2013] OJ C303/13 at [117]–[118].
[33] *TV and Computer Monitor Tubes* EC summary, [2013] OJ C303/13 at [119].
[34] *TV and Computer Monitor Tubes* EC summary, [2013] OJ C303/13 at [120]–[122].
[35] Until 2008, the name of the undertaking was Matsushita Electric Industrial.
[36] *TV and Computer Monitor Tubes* EC summary, [2013] OJ C303/13 at [123]–[126].
[37] *TV and Computer Monitor Tubes* EC summary, [2013] OJ C303/13 at [127]–[133].
[38] *A Ahlström Osakeyhtiö v Commission of the European Communities ("Woodpulp")* (Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85) [1988] E.C.R. 5193; [1988] 4 C.M.L.R. 901.
[39] *Woodpulp* [1988] E.C.R. 5193; [1988] 4 C.M.L.R. 901 at [589]–[591].
[40] *Gencor Ltd v Commission of the European Communities* (T-102/96) [1999] E.C.R. II-753; [1999] 4 C.M.L.R. 971.
[41] *Woodpulp* [1988] E.C.R. 5193; [1988] 4 C.M.L.R. 901 at [593]–[597].

Fourth, the EC found that there were two separate single and continuous infringements, one for CDTs and another for CPTs.[42] The two infringements were linked in various ways. Nevertheless, the EC considered them separate, because they concerned two different products with inherently different market conditions, different production areas and different customers. Also, the CDT and CPT cartels primarily focused on different anti-competitive practices and they were implemented in dissimilar ways. The EC also considered that there was no evidence supporting the conclusion that there was an overarching scheme that would bind the two infringements together.[43]

Fifth, as regards the addresses of the EC Decision, various arguments were raised in relation to the liability of the parent companies for the actions of their joint ventures.

As regards Philips and LGE, until 2001 the companies were held liable for both the CDT and CPT infringements.[44] After 2001, Philips and LGE were held jointly and severally liable for the infringements committed by their joint venture.[45]

Philips and LGE argued that the EC previously had found in its merger control decision that the Philips/LGE joint venture would be an autonomous entity, namely a full-function joint venture with its own management for its day-to day operations, its own resources, staff and financial resources. Therefore, liability to the parent company could be attributed only if both entities formed a single economic unit.[46] However, the EC dismissed this argument, stating that the concept of full-functionality is used only in the specific context of the EU Merger Regulation.[47]

A similar conclusion was reached by the EC in relation to Toshiba, Panasonic and the MTPD joint venture formed in 2003.[48] In other words, in both cases the EC found that the parent companies exercised decisive influence over the joint venture given, notably, their supervisory and management role, their previous involvement in and awareness of the infringements, and the fact that individuals had simultaneously or consecutively participated in cartel contacts.

Toshiba argued that it was only a minority shareholder and that Panasonic had sole control over MTPD.[49] However, the EC found that the rights granted to Toshiba (e.g. veto rights) were greater than those given to minority shareholders in order to protect their financial interests.[50] According to the EC, the possibility of exercising decisive influence did not require the exercise of influence over the day-to-day management of the joint venture's operation, nor its commercial policy, but rather over its general strategy which defines its business orientation.[51]

Sixth, as regards fines, the EC held that there was no reason for a separate calculation of the value of the sales of CPTs or CDTs depending on the size or

[42] *Woodpulp* [1988] E.C.R. 5193; [1988] 4 C.M.L.R. 901 at [645].
[43] *Woodpulp* [1988] E.C.R. 5193; [1988] 4 C.M.L.R. 901 at [651]–[656].
[44] *Woodpulp* [1988] E.C.R. 5193; [1988] 4 C.M.L.R. 901 at [786] and [803].
[45] *Woodpulp* [1988] E.C.R. 5193; [1988] 4 C.M.L.R. 901 at [805].
[46] See *Philips/LG Electronics/JV* —Case COMP/M.2263.
[47] *Woodpulp* [1988] E.C.R. 5193; [1988] 4 C.M.L.R. 901 at [68].
[48] *Woodpulp* [1988] E.C.R. 5193; [1988] 4 C.M.L.R. 901 at [921], [927]–[929], [931], [937]–[938] and [940].
[49] *Woodpulp* [1988] E.C.R. 5193; [1988] 4 C.M.L.R. 901 at [949]–[951] and [954].
[50] *Woodpulp* [1988] E.C.R. 5193; [1988] 4 C.M.L.R. 901 at [956].
[51] *Woodpulp* [1988] E.C.R. 5193; [1988] 4 C.M.L.R. 901 at [958].

product specifications.[52] Direct EEA sales and direct EEA sales through transformed products, delivered in the EEA, were taken into account.[53]

The EC decided to use the average annual value of sales as the basis of its calculation given the significant decrease of the sales towards the end of the infringements.[54] The gravity percentage was set at 19% for the CDT cartel and 18% for the CPT one.[55] No aggravating or mitigating circumstances were found.[56] For Toshiba, a deterrence multiplier of 10% was applied, while for Panasonic and MTPD it was set at 20%.[57]

In terms of fine reductions, Chunghwa was given full immunity, while Samsung, Philips and Technicolor were granted 40%, 30% and 10% reductions respectively for their cooperation, in line with the EC's 2006 Leniency Notice.[58] The EC further reduced the fine for one of the undertakings concerned due to its inability to pay, according to point 35 of the EC Fining Guidelines.[59]

The overall fines imposed were as follows: Chunghwa, €0 (immunity applicant); Samsung, €150.8 million; Philips, €313.3 million; LGE, €295.5 million and the Philips/LGE JV, €391.9 million; Technicolor, €38.6 million; Panasonic, €157.4 million; Toshiba, €28 million,[60] MTPD, €86.7 million,[61] Panasonic and MTPD, €7.9 million.

Other

In July 2020, the EC published its summary of the *Forex-Three Way Banana Split* case.[62] In September 2020, the EC also published its summary of its readopted decision in 2019 in the *Italian Reinforcing Steel Bars* case, together with the Hearing Officer's report.[63]

Other article 101 TFEU

Box 12

- **European Commission Decisions—Other art.101 TFEU**
  - *Comcast/NBC Universal* decision: fine for active/passive, territorial/customer restrictions, and offline/online restrictions for film merchandise (e.g. re. The Minions)
    - €14 million
      - Non-exclusive licences
      - "European Union sales" clause

[52] *Woodpulp* [1988] E.C.R. 5193; [1988] 4 C.M.L.R. 901 at [1019].
[53] *Woodpulp* [1988] E.C.R. 5193; [1988] 4 C.M.L.R. 901 at [1021] and [1034].
[54] *Woodpulp* [1988] E.C.R. 5193; [1988] 4 C.M.L.R. 901 at [1039].
[55] *Woodpulp* [1988] E.C.R. 5193; [1988] 4 C.M.L.R. 901 at [1070].
[56] *Woodpulp* [1988] E.C.R. 5193; [1988] 4 C.M.L.R. 901 at [1078]–[1079].
[57] *Woodpulp* [1988] E.C.R. 5193; [1988] 4 C.M.L.R. 901 at [1111].
[58] *Woodpulp* [1988] E.C.R. 5193; [1988] 4 C.M.L.R. 901 at [1125], [1132], [1053] and [1162].
[59] *Woodpulp* [1988] E.C.R. 5193; [1988] 4 C.M.L.R. 901 at [1182].
[60] The fine was annulled by the GC because the EC had not proved Toshiba's direct participation in the infringement prior to the creation of the MTPD JV with Panasonic, see *Toshiba Corp v European Commission* (T-104/13) EU:T:2015:610; [2015] 5 C.M.L.R. 21. The ECJ upheld the GC's ruling, see *Toshiba* EU:C:2017:21; [2017] 4 C.M.L.R. 17.
[61] The fine was reduced to €82.8 million by the GC, see *Toshiba* EU:T:2015:610; [2015] 5 C.M.L.R. 21.
[62] *Forex-Three Way Banana Split*—Case AT.40135, [2002] OJ C226/5.
[63] *Italian Reinforcing Steel Bars*— Case AT.37956, [2020] OJ C312/7.

- 30% reduction for early cooperation/action on compliance

– *Sanrio* decision: fine for similar infringement re. character merchandise (e.g. re. Hello Kitty)
  * €6.2 million
  * 40% reduction for early cooperation/action on compliance/additional evidence

– Both cases involve a catalogue of direct and indirect unlawful restrictions

– *Mélia*
  * €6.7 million fine on Spanish hotel group for active/passive, territorial sales restrictions on hotel accommodation in agreements with tour operators
  * 30% fine reduction for cooperation

NBC Universal—Film Merchandise

In January 2020, the EC fined Comcast Corporation and nine of its subsidiaries including NBCUniversal, which runs its merchandising (together referred to as "Universal" in the decision) some €14.3 million for infringing art.101 TFEU. Universal was found to have implemented and enforced within the EEA a series of agreements and concerted practices restricting active and passive sales of licensed merchandise across territories and across customer groups, conduct which constituted a "by object" restriction of competition under art.101(1) TFEU.[64]

Universal is a US-based global media and technology group. Its core business is the operation of cable and broadcast networks and film and television production companies, as well as the production, acquisition, marketing and distribution of film, digital and television entertainment content.[65]

The decision concerns Universal's activities as a licensor for its film properties. Universal licenses its film-related intellectual property (IP) rights to other undertakings which produce and distribute various types of branded merchandise products (e.g. toys, fashion items, stationery, publications).[66] The restrictions concerned merchandise products featuring the Minions, Jurassic World and other images and characters from NBCUniversal's films.

The main points in the decision are as follows:

First, Universal licenses its IP rights in the EEA either directly or indirectly through an agent. Apart from the grant of IP rights, Universal's licence agreements also cover the manufacturing and distribution of the licensed products. Generally, these agreements are granted on a non-exclusive basis for one or more EEA countries, although in practice there is generally limited overlap between the products and the territories in licensees' agreements. The agreements also typically include a list of distribution channels through which the licensee may distribute the products.[67]

Second, in its decision, the EC found that Universal put in place a series of practices throughout its merchandising business which restricted active and passive sales of licensed merchandise to the territories and/or customers allocated to its

[64] With thanks to Georgia Tzifa. *Film merchandise*—Case AT.40433. EC Press Release IP/20/157, 30 January 2020. The EC's summary decision is in [2020] OJ C133/12. The non-confidential version of the decision is available on the EC's website.
[65] *Film merchandise* EC summary decision [2020] OJ C133/12 at [4] and [18].
[66] *Film merchandise* EC summary decision [2020] OJ C133/12 at [9] and [19].
[67] *Film merchandise* EC summary decision [2020] OJ C133/12 at [20] and [24]–[25].

licensees. These practices concerned both offline and online sales of licensed merchandise products throughout the EEA.[68]

Third, the EC found that the practices were implemented by both contractual and non-contractual means. In other words, in addition to express contractual prohibitions or restrictions, at times Universal would request licensees to limit their activities to the territories or customers assigned to them in their merchandising licence agreements.

The following main types of direct restrictions are noted in the decision: [69]

- prohibition of out-of-territory passive sales;
- prohibition of out-of-territory active sales;
- prohibition of online sales;
- obligation to notify Universal of out-of-territory sales;
- use of language requirements to restrict out-of-territory sales;
- prohibition of sales outside of allocated customer groups; and
- obligations to pay to Universal revenues generated from sales beyond the allocated territories and customer groups.

Fourth, as regards, in particular, the prohibition of out-of-territory passive sales, most agreements also included a so-called "European Union sales" clause. This clause essentially provided that to the extent EU law limits "the enforceability of any territorial restrictions" contained in the agreement, then these restrictions "shall be deemed modified to the minimum extent necessary to comply with the legal requirements".[70] The EC found that, while this clause might have been meant to allow for compliance with EU law, its language and scope of application were unclear and vague. The clause was not always understood by licensees as allowing for passive sales beyond the allocated EEA territory. There was also evidence that Universal at times discouraged such sales, despite that provision.[71]

Fifth, apart from these direct restrictions, Universal also implemented a series of indirect measures in order to encourage compliance. Among others, Universal would conduct audits to ensure that licensees were restricting their sales to the allocated customers and territories. It also warned licensees that in case of non-compliance, it might terminate or not renew their contracts. At times the EC noted that Universal did terminate such contracts or refuse to conclude additional ones.[72]

Sixth, Universal imposed an obligation on its licensees to pass on these restrictions to their customers. Universal's agreements explicitly prohibited licensees from supplying their licensed merchandise products to customers who sell or intend to sell those products, online or offline, outside the allocated territories. Although not expressly provided for in the agreements, non-contractual evidence indicated that Universal imposed similar obligations on its licensees to pass on the customer restrictions.[73]

[68] *Film merchandise* EC summary decision [2020] OJ C133/12 at [31].
[69] *Film merchandise* EC summary decision [2020] OJ C133/12 at [32]–[33] and [35]–[63].
[70] *Film merchandise* EC summary decision [2020] OJ C133/12 at [37].
[71] *Film merchandise* EC summary decision [2020] OJ C133/12 at [38]–[39].
[72] *Film merchandise* EC summary decision [2020] OJ C133/12 at [34] and [64]–[67].
[73] *Film merchandise* EC summary decision [2020] OJ C133/12 at [68]–[72].

Seventh, the EC recalled that, on the case law, agreements aimed at partitioning national markets along national borders or at allocating customers, were, in principle, “by object” restrictions under art.101(1) TFEU. The same applied to contractual provisions prohibiting de facto the internet as a method of marketing.[74]

Eighth, the EC found that, through the set of its agreements and/or concerted practices, Universal restricted the ability of its licensees to sell licensed merchandise beyond allocated territories or customers, thereby partitioning the EEA market. Since these practices restricted to whom or where products may be sold, by their very nature they had as their object the restriction of competition within the internal market within the meaning of art.101(1) TFEU. In that way, Universal achieved a compartmentalisation of its licensing network, restricting sales across territories and customers within the EEA.[75] Such practices were not capable of exemption under art.101(3) TFEU.[76]

Ninth, the EC found that the conduct concerned amounted to a single and continuous infringement from January 2013 to September 2019, when Universal sent letters informing all its licensees that the sales restrictions in its agreements ceased to apply in the EEA.[77]

Finally, as regards fines, the EC set the gravity percentage at 8% of Universal’s value of sales and granted a 30% reduction on the fine, to reflect Universal’s effective and timely cooperation (pursuant to point 37 of the EC Fining Guidelines).[78] Notably, Universal started to rectify its practices as soon as the formal proceedings were opened and offered to cooperate with the EC, before the EC issued the SO.[79] Universal also gave the EC additional evidence on the infringement.

Sanrio—Character Merchandise

It may be recalled that in July 2019 the EC imposed a fine of €6.2 million on Sanrio including the Japanese parent company and its Sanrio and Mister Men subsidiaries in Europe.[80] This was briefly summarised from the Press Release last year.[81]

In November 2019, the EC published the non-confidential version of its decision on its website, and its summary.[82] The decision is very similar to the *NBC Universal* one.

The main points of interest are as follows:

First, the decision is another example of sales restrictions in merchandise licensing agreements (with *Nike*[83] and *NBC Universal*, just noted).

Second, the infringement included a series of direct and indirect restrictions on active, passive and online cross-border sales of licensed merchandise.[84]

74 *Film merchandise* EC summary decision [2020] OJ C133/12 at [92] and [95].
75 *Film merchandise* EC summary decision [2020] OJ C133/12 at [96]–[98].
76 *Film merchandise* EC summary decision [2020] OJ C133/12 at [115]–[117].
77 *Film merchandise* EC summary decision [2020] OJ C133/12 at [118]–[122].
78 *Film merchandise* EC summary decision [2020] OJ C133/12 at [142] and [150]–[152].
79 *Film merchandise* EC summary decision [2020] OJ C133/12 at [120]-[122].
80 *Character merchandise*—Case AT.40432, EC Press Release IP/19/3950, 9 July 2019.
81 See John Ratliff “Major Events and Policy Issues in EU Competition Law 2018-2019: Part 2” [2020] I.C.C.L.R. 201, 221.
82 See *Character merchandise* EC summary [2019] OJ C386/24.
83 See *Ancillary sports merchandise*—Case AT.40436. EC Decision of 25 March 2019.
84 *Character merchandise* EC summary, points 2 and 13.

Third, Sanrio typically licensed to companies which would apply the images concerned (e.g. Hello Kitty, Mister Men) to various products, including stationery, school supplies, gifts and accessories. Licences would have a territorial scope for one or more specific countries and generally be non-exclusive[85] (although some may have been designed to be de facto exclusive[86]). The EC notes that merchandise licensing is generally non-exclusive.[87]

Fourth, the EC found that Sanrio pursued a number of measures to allocate territories and deny intra-brand competition. The EC notes some which were in the wording of the relevant agreements; and others which were in the way Sanrio acted vis-à-vis its licensees. The EC lists the following:[88]

- prohibitions of out-of-territory passive sales (including in some cases despite licence wording allowing them);[89]
- prohibitions of out-of-territory active sales;
- prohibitions of out-of-territory online sales;
- obligations to refer orders for out-of-territory sales to Sanrio;
- use of language requirements to restrict out-of-territory sales;
- checking on whether more sales had been made out-of-territory than reported to Sanrio when auditing sales figures for royalty purposes;[90] and
- threats of non-renewal of contracts and actual non-renewal for out-of-territory sales.[91]

Fifth, the EC noted that insofar as these measures contributed to restoring divisions between national markets, they amounted to a restriction by object.[92]

Sixth, the EC noted that neither the Vertical Restraints Block Exemption,[93] nor the Technology Transfer Block Exemption[94] could apply, since the measures concerned were hard-core restrictions under those block exemptions.[95]

Finally, as regards the fine, the EC took Sanrio's royalty revenue for the merchandising in the EEA as the reference turnover.[96] In setting the proportion of turnover to be taken into account to set the gravity of the infringement, the EC set the percentage at 8% (as a vertical restraint case).[97]

The EC granted Sanrio a 40% reduction for cooperation (under point 37 of the EC Fining Guidelines). Sanrio started to rectify its compliance position (e.g. through letters to licensees stating that out-of-territory restrictions in its agreements were inapplicable)[98] rapidly after the EC's dawn raid, even before the EC formally opened proceedings in the case, and was found to have brought the infringement

[85] *Character merchandise* EC decision at [18].
[86] *Character merchandise* EC decision at [42].
[87] *Character merchandise* EC decision at [61].
[88] *Character merchandise* EC decision at [31]–[58].
[89] *Character merchandise* EC decision at [36]–[40] and [118].
[90] *Character merchandise* EC decision at [57].
[91] *Character merchandise* EC decision at [58].
[92] *Character merchandise* EC decision at [75]–[79] and [80]–[83].
[93] EC Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, [2010] OJ L102/1.
[94] EC Regulation 316/2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements Text with EEA relevance, [2014] OJ L93/17.
[95] *Character merchandise* EC decision at [99].
[96] *Character merchandise* EC decision at [124]–[125].
[97] *Character merchandise* EC decision at [128].
[98] *Character merchandise* EC decision at [104]–[108].

to an end before the EC issued its SO. Sanrio appears also to have made its formal offer to cooperate before the SO and to have given evidence showing a longer duration of infringement.[99]

Meliá Hotels International

In February 2020, the EC adopted a decision fining the Spanish hotel group, Meliá Hotels International (Meliá), some €6.7 million for including restrictive clauses in its agreements with tour operators that discriminated between customers within the EEA based on their place of residence.[100] At the same time the EC closed proceedings concerning four tour operators.

The EC found that Meliá entered into contracts with tour operators that restricted active and passive sales for hotel accommodation. In particular, Meliá's standard terms and conditions for contracts with tour operators contained a clause according to which those contracts were valid only for reservations of consumers who were resident in specified countries.[101] As a result, the EC noted that consumers were not able to see the full hotel availability or book hotel rooms at the best prices with tour operators in other Member States.

The infringement was found to be from January 2014 until December 2015.

The key clause in Meliá's standard terms stated as follows:

> "APPLICATION MARKET: contract valid only and exclusively for the markets that are detailed in the observation 16. the hotel will be able to request to the agency/to [tour operator] to verify the market of origin of any reservation on which it exist any reasonable doubt, in any case, if at the arrival of the clients to the hotel, it is verified that the country of residence of them is different than the one agreed as per contract, the hotel would be entitled to reject the reservation."[102]

In the individual contracts with tour operators, Observation 16 was either empty or specified the country or countries for which the contract was valid. Approximately 30% of the contracts in force for Meliá's holiday resort hotels specified at least one country in Observation 16 (2,212 contracts in 2014; 2,004 contracts in 2015).[103]

The EC considered the relevant contracts to be caught by arts 101 TFEU and 54 EEA, the objective of the contracts and the standard terms being to restrict the ability of the tour operators to sell Meliá's hotel accommodation to, and respond to unsolicited requests from, consumers residing outside the country or countries specified in Observation 16.[104]

The EC found that the overall objective of the clause noted above and Observation 16 was to ensure that the tour operator adhered to the terms of the contract, and that those contractual terms (in particular, price) were valid only for

[99] *Character merchandise* EC decision at [12] and [136]–[137].

[100] With thanks to Édouard Bruc for his assistance. *Meliá*—Case AT.40528 (Holiday pricing). EC Press Release IP/20/302, 21 February 2020. The EC's summary is in [2020] OJ C182/9. The decision is available on the EC's website.

[101] *Meliá* EC decision at [13].

[102] *Meliá* EC decision at [20].

[103] *Meliá* EC decision at [21]–[22].

[104] *Meliá* EC summary, [2020] OJ C182/9, point 13.

reservations of consumers who were resident in the country or countries specified in Observation 16. The EC found that those provisions deterred the tour operators that were party to the relevant contracts from distributing the hotel accommodation in countries other than those listed in Observation 16.[105]

As a result, the EC found that Meliá's standard terms and conditions for contracts with tour operators, which tended to restore divisions between national markets in the EU, were unlawful and constituted a restriction by object under art.101(1) TFEU.[106]

Meliá argued that the practices should be exempted under art.101(3) TFEU. Notably that the system sought to increase the room occupancy rate by accounting for different consumption patterns in the various markets (such as seasonality and different booking, behavioural and travelling habits of different countries' residents); or to ensure that the low prices for rooms to be included in packages reached the targeted consumers and were not used by the tour operators in the high-price markets.[107]

However, the EC rejected this. The EC noted that, since the restrictions were "hard core" under the Vertical Restraints Block Exemption,[108] that exemption could not apply.[109]

Article 101(3) TFEU also could not apply insofar as, even though there might have been a positive effect for consumers in certain markets (namely those for whom a lower price was earmarked), "negative effects on consumers in one geographic market or product market (namely the consumers who were prevented from buying the accommodation at that lower price) cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market".[110]

Further, the EC considered that clauses that restricted the ability of tour operators to sell accommodation to consumers outside of a specified country or countries were not indispensable for improving the efficiency of Meliá's hotel accommodation distribution system. The objectives sought (namely higher occupancy rate and better yield management) could be achieved by other more direct, tailored solutions which did not differentiate between consumers based on their country of residence or nationality (such as seasonality rates and "only-packages" clauses).[111]

As regards the fine, the EC set the percentage of the value of sales for the gravity of the infringement at 7% (taking into account that this was a vertical restriction). In order to reflect Meliá's cooperation with the EC (before the SO),[112] and applying point 37 of the EC Fining Guidelines, the EC reduced the basic amount of the fine by 30%. Overall therefore, the EC set the fine at €6.7 million.

[105] *Meliá* EC decision at [43]–[49].
[106] *Meliá* EC decision at [41]
[107] *Meliá* EC decision at [62].
[108] *Meliá*EC Regulation 330/2010, [2010] OJ L102/1.
[109] *Meliá* EC decision at [60].
[110] *Meliá* EC decision at [63]. See para.43 of the Guidelines on the application of art.81(3) of the EC Treaty, [2004] OJ C101/97.
[111] *Meliá* EC decision at [64].
[112] *Meliá* EC decision at [15].

Article 102 TFEU—New

Box 13

- **European Commission Decisions—Article 102 TFEU—New**
  - *Aspen*—Excessive pricing
    - Commitments (approx. 73% price reduction)
    - "Rebate" to public and private entities affected
    - EC looked at Aspen's margins "in absolute terms" and compared to others' margins
  - *Broadcom*—Exclusivity requirements, cross-leveraging among dominant products and leveraging to non-dominant products
    - Interim measures decision
    - Main case settled with commitments
      - Not > 50% of total worldwide requirements
      - More specific in EEA: no specified percentage of equipment for EEA users/EEA requirements
      - Flexibility on individual tenders
      - No bundling
  - *Telenor*—ESA—Margin squeezing re. standalone mobile broadband services in Norway
    - Full decision

Aspen—Excessive Pricing

It may be recalled that in May 2017, the EC opened a formal investigation into Aspen Pharmacare (Aspen), a global pharmaceutical company headquartered in South Africa, over concerns that Aspen had engaged in excessive pricing concerning certain cancer medicines.[113]

In July 2020, the EC published proposed commitments to meet such concerns by Aspen on its website, inviting third-party comments.[114]

The proposed commitments cover six off-patent prescription medicines that are used in the treatment of certain types of cancer, mainly hematologic cancers, such as lymphocytic leukemia. The medicines were sold under the brand names Alkeran, Purinethol, Leukeran, Lanvis and Myleran.

The commitments cover the entire EEA, except for Italy, where a decision by the Italian Competition Authority was taken in 2016 regarding the Italian market and the same medicines (except for Myleran).

The main points of the preliminary assessment by the EC are as follows:

First, the EC has concerns that Aspen may have been abusing its dominant position in each of these medicines in distinct national markets in the EEA, by charging excessive prices for off-patent cancer medicines.[115]

Notably, the EC's analysis of Aspen's accounting data on revenues and costs suggested that Aspen consistently earned very high profits from its sale of cancer

[113] With thanks to Lukas Šimas. See EC Press Release IP/17/1323, 15 May 2017.

[114] Case AT.40394—*Aspen*. EC Press Release IP/20/1347, 14 July 2020. The Draft Commitments are available on the EC's website. The Art.27(4) Notice is in [2020] OJ C233/7.

[115] See *Aspen* Art.27(4) Notice, point 5; and the EC's Questions and Answers, QANDA/20/1339, 14 July 2020.

medicines in Europe between 2012 and 2019, both in absolute terms and when compared with the profit levels of similar companies in the industry. According to the EC, Aspen's prices exceeded its relevant costs by almost 300% on average, including allowing for a reasonable rate of return. Moreover, Aspen's average EEA-wide profits were more than three times higher than for similar businesses in the pharma industry taken as "comparators".[116]

Second, it appears that Aspen acquired the cancer medicines in question from another company in 2009. The alleged conduct with very high price increases started in May 2012.

Third, the EC found no legitimate justification for the very high profit levels (e.g. Aspen's medicines had been off-patent for 50 years, so R&D investment had already been fully recouped).

Fourth, the EC noted that, for most of the six medicines, there were no alternative suppliers and, in the few Member States where other pharma companies entered the market, they did so only very recently. National pricing and reimbursement authorities were under pressure to ensure the supply of these essential medicines to patients and therefore had little option but to agree to Aspen's price increase requests.

Aspen's proposed commitments, while not agreeing with the EC's preliminary assessment, were as follows:

First, Aspen proposed to significantly reduce the net prices of its six cancer medicines to wholesalers. On average, Aspen's net prices would drop by approximately 73% across all the medicines and EU Member States concerned (with variations across the EU).[117] For most of the medicines and on average, the reduced net prices would be below the levels of 2012, when Aspen started its strategy of high price increases. The prices proposed are maximum net prices (price ceilings).[118]

Second, the price commitments are made for a period of ten years (as of October 2019).[119] During the second half of that ten-year period, Aspen is entitled to one review of the net price ceilings, with the support of an independent monitoring trustee, but only if Aspen's costs linked to the medicines increase significantly (by at least 20%).[120]

If accepted by the EC, the reduced prices would be applied retroactively from October 2019 (when Aspen Pharma proposed them concretely), so a form of "transitory rebate" would be paid to the public and private entities that paid for the medicines (the appropriate beneficiaries being listed in the commitments in detail by country).[121]

Third, Aspen has proposed to ensure the continued supply of these off-patent medicines. Aspen would commit: (i) to the continued supply of the medicines for the next five years; and (ii) for an additional five-year period, either by supplying the medicines itself or making its marketing authorisation available to other suppliers.[122]

[116] See *Aspen* Art.27(4) Notice, point 7.
[117] See the Draft Commitments, [6]–[8], where a specific table is set out, and *Aspen* Art.27(4) Notice, point 10.
[118] See *Aspen* Art.27(4) Notice, point 10.
[119] See *Aspen* Art.27(4) Notice, point 10.
[120] See the Draft Commitments at [45].
[121] See the Draft Commitments at [9].
[122] See the Draft Commitments at [16]–[19].

Broadcom

Background—Interim measures It may be recalled that in June 2019, the EC launched a formal antitrust investigation as regards the US chipmaker Broadcom to assess whether it was restricting competition through exclusivity practices.[123]

In parallel, in October 2019, the EC adopted a decision taking interim measures against Broadcom, ordering the company to cease applying certain provisions contained in agreements with six of its main customers.[124] Pursuant to art.8 of Regulation 1/2003, the EC found that:

- Broadcom was prima facie dominant in the markets for "systems-on-a-chip" (SoCs) for: (i) TV set-top boxes; (ii) fibre modems; and (iii) xDSL modems (the "Relevant Products").
- Broadcom was prima facie infringing the competition rules, by entering into exclusivity arrangements with six manufacturers of TV set-top boxes and modems, and service providers (i.e. a telecoms operator or cable service provider that provides equipment to end-users), that would: (i) strengthen or cross-leverage its dominant position in the markets for the Relevant Products; and (ii) leverage its dominance into the separate market for SoCs for cable modems, front-end chips for TV set-top boxes and modems, and/or WiFi chips for set-top boxes and modems (the "Other Products").
- Broadcom's conduct would likely affect a number of tenders that would be launched in the future, also in relation to the introduction of the WiFi 6 standard for modems and TV set-top boxes. This would likely lead to competitors being unable to compete with Broadcom and could lead to serious and irreparable harm in the form of their exit or marginalisation.

In October 2020, the EC published the non-confidential version of its interim measures decision on the EC's website.[125] The main points of interest are as follows.

First, the EC relied on the standard legal test in relation to exclusivity in this context, "all or most" of a customer's requirements, and recalled that the percentage of 80% is sufficient to constitute "most" of a company's requirements (called "quasi-exclusivity"). The EC also noted that lower percentage purchasing obligations already have been found to constitute quasi-exclusivity.[126]

Second, the EC noted that such practices may tend to strengthen a dominant position in the markets in question, or to leveraging dominance into a neighbouring but separate market on which the company may not be dominant, or to cross-leverage across a portfolio of products, in which a company is dominant.[127]

[123] With thanks to Marilena Nteve. EC Press Release IP/19/3410, 26 June 2019.

[124] *Broadcom*—Case AT.40608. EC Press Release IP/19/6109, 16 October 2019.

[125] EC Decision of 16 October 2019 relating to a proceeding under art.102 TFEU, art.54 EEA and art.8 of Regulation 1/2003 *Broadcom*—Case AT.40608, C(2019) 7406 final ("Interim measures decision").

[126] *Broadcom* Interim measures decision at [181]–[183]. That is, 75% in *F Hoffmann La Roche & Co AG v Commission of the European Communities* (C-85/76) EU:C:1979:36; [1979] E.C.R. 461, Judgment of 13 February 1979.

[127] *Broadcom* Interim measures decision at [184], [240]–[242] and [365].

Third, it is open to the undertaking concerned to justify its conduct on the basis of objective justification/or efficiencies. In other words, that the potential foreclosure effect is counterbalanced or outweighed by efficiencies.[128]

Fourth, among other arguments, Broadcom argued that:

- the exclusivity or quasi-exclusivity clauses reflected Broadcom's significant investment in its commercial relationships with original equipment manufacturers (OEMs) and with service providers;
- "opt-outs" allowed OEMs to bid non-Broadcom products; and
- the agreements concerned concretised an already existing and entirely voluntary state of affairs in which OEMs' perception of the quality of Broadcom's offering and of Broadcom being a valued partner had led to a long-standing commercial relationship with the relevant OEM, and a de facto exclusive or quasi-exclusive supply of Broadcom products.[129]

However, the EC rejected all these arguments.[130]

Fifth, the EC rejected Broadcom's argument that the EC did not assess the actual capacity of the agreements in question to foreclose as-efficient competitors, thereby ignoring the *Intel*[131] judgment. The EC stated that the legal test imposed by *Intel* would not be applicable to Broadcom's conduct, because the advantages granted by the agreements concerned were not only limited to rebates, but also included non-price advantages.[132]

Nevertheless, the EC stated that it had "gone beyond the presumption" set by the *Intel* judgment as regards exclusivity and quasi-exclusivity arrangements, by carrying out an assessment of the capability of the agreements concerned to affect competition. The analysis carried out by the EC had led to the conclusion that Broadcom's conduct was prima facie capable of restricting competition, also in light of the criteria established by *Intel*. In other words, considering Broadcom's dominant position on the relevant markets; the share of the market covered by the challenged practices; the conditions and arrangements for granting the rebates in question, their duration and their amount; a large amount of qualitative evidence (in terms of contemporaneous documents and responses to request for information); and the EC had noted the existence of a possible foreclosure strategy.[133]

Sixth, the EC also noted that it is not required by the *Intel* judgment to assess Broadcom's conduct against the as-efficient competitor test. Nor had Broadcom submitted such an analysis.[134]

Finally, as one would expect in an interim measures decision, it should be emphasised that all these findings were "prima facie".

Main proceedings—Commitments As regards the main case, although Broadcom did not agree with the EC's assessment, in April 2020, it decided to

[128] *Broadcom* Interim measures decision at [185] and [405]–[414].
[129] *Broadcom* Interim measures decision at [264].
[130] *Broadcom* Interim measures decision at [265]–[294].
[131] *Intel Corp Inc v European Commission* (C-413/14 P) EU:C:2017:632; [2017] 5 C.M.L.R. 18, Judgment of 6 September 2017.
[132] *Broadcom* Interim measures decision at [342] and [346].
[133] *Broadcom* Interim measures decision at [349] and [361]–[371].
[134] *Broadcom* Interim measures decision at [350]–[351].

offer commitments pursuant to art.9 of Regulation 1/2003 to meet the EC's concerns, which the EC market-tested.[135] Broadcom then amended its proposed commitments and, in October 2020, the EC accepted Broadcom's revised commitments and made them legally binding.[136]

The main points of the final commitments are as follows:

First, at worldwide level (excluding China), Broadcom commits to suspend any existing agreements and not to enter into new agreements:

- requiring an OEM to purchase *more than 50%* of its *total requirements* for the Relevant Products from Broadcom; or conditioning non-price advantages (e.g. technical support and/or early access to Broadcom's technology); or retroactive price advantages related to these products on the same requirement, where the products are supplied to OEMs for supply to end-users outside China (i.e. addressing the exclusivity/quasi-exclusivity issue); and/or
- conditioning the supply of, or the granting of advantages for, a Relevant Product on an OEM purchasing *more than 50%* of its total requirements for another Relevant Product, or *more than 50%* of its requirements for *any Other Product from Broadcom* (i.e. addressing the cross-leveraging and leveraging).[137]

Second, Broadcom commits to more EEA-specific terms:

- Broadcom undertakes to suspend any existing agreements and not to enter into new agreements which require *an OEM* to purchase Broadcom Relevant Products *for any specific percentage* of its *EEA requirements*, or condition a non-price advantage, or retroactive price advantage on the OEM purchasing *any specified minimum percentage* of its *EEA requirements* (addressing the exclusivity/quasi-exclusivity issue);[138]
- as regards Service Provider equipment *to be provided to end-users in the EEA*, Broadcom undertakes not to condition supply of its Relevant Products on an OEM purchasing *another Broadcom Relevant Product* or *Other Products*; or offer an advantage with bundling of such products (i.e. addressing cross-leveraging and leveraging issues);[139] and
- As regards EEA requests for proposals, Broadcom will not require an OEM to bid only devices based on Broadcom Relevant Products, or grant advantages for doing so. However, under specific conditions, Broadcom would be able to grant advantages for an *individual EEA tender* bidding only Broadcom Relevant Products (e.g. unless the Service Provider has requested that the OEM bid both Broadcom

[135] Communication from the Commission published pursuant to art.27(4) of Council Regulation (EC) 1/2003 in Broadcom (2020/C 142/03), Case AT.40608. See also EC Press Release IP/20/755, 27 April 2020. The Art.27(4) Notice is in [2020] OJ C142/4.

[136] EC Press Release IP/20/1852, 7 October 2020. See *Broadcom*—Case AT.40608. Commitments under art.9 of Regulation 1/2003, 7 October 2020, available on the EC's website.

[137] *Broadcom* Commitments under art.9 at [1]–[2].

[138] *Broadcom* Commitments under art.9 at [1].

[139] *Broadcom* Commitments under art.9 at [3].

and non-Broadcom Relevant Products) (allowing for some flexibility unless the customer specifies otherwise).[140]

As regards EEA Service Providers, Broadcom also undertakes:

- not to require them, or incentivise them through advantages to purchase or specify use of Broadcom Relevant Products for *any specified minimum percentage of the EEA Service Provider's total requirements for Relevant Product* (addressing exclusivity or quasi-exclusivity); and/or
- to require or incentivise them through advantages to request OEMs to bid only Broadcom Relevant Products or refrain from bidding any non-Broadcom Relevant Products (i.e. addressing exclusivity or quasi-exclusivity issues); and/or
- to require or incentivise them to concurrently source, together with a *Broadcom Relevant Product*, another *Relevant Product* or *Broadcom Other Product* (i.e. addressing the cross-leveraging and leveraging issues).[141]

This is provided that the relevant Service Provider equipment is to be *supplied to end-users in the EEA*.

Broadcom also undertakes not to change standard-based interfaces used in Relevant Products, degrading interoperability between Broadcom Relevant Products and Other Products not made by Broadcom (without prejudice to Broadcom's discretion to implement new standards, or develop supplementary interfaces).

Broadcom's revised commitments are for seven years.

Broadcom is required to supply reports every six months.

The EC indicated that the commitments are binding vis-à-vis all OEMs and include products not covered by the interim measures decision.

The EC also noted that its decision concluded its interim measures proceedings.

Comment The commitments are hard to follow,[142] but appear therefore to allow for 50% requirements worldwide based on total requirements, while not allowing any fixed percentage of supply based on EEA requirements, save that there is some scope for flexibility in individual tenders.

It will be interesting to learn more on how this is justified in the EC's commitments decision, when published. One senses it may be driven by jurisdictional questions, variations in competition worldwide, and the *Tomra*[143] and *Coca Cola*[144] cases.

Telenor—Margin Squeezing

In June 2020, the EFTA Surveillance Authority (ESA) found that Telenor, the Norwegian telecoms incumbent, had infringed art.54 EEA, through

[140] *Broadcom* Commitments under art.9 at [4].
[141] *Broadcom* Commitments under art.9 at [5].
[142] In particular, in the Art.27(4) Notice cited above, it is said that there is a 50% of EEA requirements threshold for EU supply, whereas the commitments put it rather differently.
[143] *Tomra Systems ASA v European Commission* (C-549/10 P) EU:C:2012:221; [2012] 4 C.M.L.R. 27, Judgment of 19 April 2012.
[144] *Coca-Cola*—Case COMP/A.39.116/B.2, EC decision of 22 June 2005, available on the EC website.

margin-squeezing with respect to mobile broadband (MBB) services to residential customers in Norway between 2008–2012.[145]

ESA found three elements of the infringement and set fines adding up to €111.9 million.[146]

ESA noted that Telenor was the owner of the public mobile telephone network in Norway. ESA found that in the relevant period the charges "upstream" by Telenor to wholesale customers for access to its public mobile telephone network (and related services), and the prices charged by Telenor to its own retail customers at the "downstream" level for residential MBB services in Norway did not allow equally efficient competitors relying on such wholesale services to compete with Telenor in the "downstream" market, without incurring a loss.[147]

MBB is used to allow end-users to access the internet "on the go" through external modules like PC cards and USB modems, or modules built into devices (PCs, laptops or tablets). The focus here was on "standalone" services, that is, those not sold as part of a package or bundle.[148]

ESA found that equally efficient competitors using Telenor's wholesale access services on its network earned, or would have earned, negative gross margins and could not replicate profitably Telenor's residential standalone MBB portfolio at the retail level.[149]

ESA looked at three levels of access, national roaming operators (NROs), mobile virtual network operators (MVNOs) and service providers (SPs), and concluded in each case that wholesale access on Telenor's tariffs resulted, or would have resulted, in negative gross margins for different periods between January 2008 and December 2012.[150]

ESA considered that an effect which is at least potentially exclusionary was probable.[151]

Article 102 TFEU

Energy—New/Old

Box 14

- **European Commission Decisions—Article 102 TFEU—New/Old—Energy**
  - *Transgaz*—Romanian gas connector
    - Commitments accepted
    - Increase of *export* capacities to Hungary and Bulgaria
    - Non-discriminatory tariff on exports/domestic use
  - *Bulgarian Energy Holding* (BEH)
    - Full decision (unusual!)

[145] *Telenor* ESA's Press Release PR(20)39, 30 June 2020. The public version of the ESA decision is available on the EFTA Surveillance Authority's website; the ESA summary is in [2020] OJ C292/13.
[146] *Telenor* ESA summary, points 19 and 26.
[147] *Telenor* ESA summary, point 11.
[148] *Telenor* ESA summary, point 11, and point 1 fn.1.
[149] *Telenor* ESA summary, point 18.
[150] *Telenor* ESA summary, point 19.
[151] *Telenor* ESA summary, point 20.

* “Clear patterns” of restricting access to third parties for upstream infrastructure to protect downstream sales

Transgaz It may be recalled that in September 2018, the EC invited comments on proposed commitments by Transgaz, the state-controlled Romanian gas transport infrastructure operator, addressing concerns as regards exports of natural gas from Romania to other EU Member States, namely Hungary and Bulgaria.[152]

The EC had concerns that Transgaz would have restricted exports of natural gas from Romania to Hungary and Bulgaria, by: (i) delaying construction of infrastructure for gas exports; and (ii) making exports commercially unviable through increases in interconnection tariffs.

Whilst denying any infringement of art.102 TFEU, Transgaz offered:

- to increase export capacities from 0.1 billion cubic metres (bcm) to 4 bcm per year at the interconnection points with Hungary and Bulgaria and to guarantee them as minimum firm (uninterruptible) amounts;
- to commit to achieve infrastructure works at the three interconnection points to enable these minimum firm capacities;[153]
- to ensure that its tariff proposal to the Romanian national energy regulator (ANRE) would not discriminate between export and domestic tariffs;[154] and
- to refrain from using any other means to hamper exports as regards gas produced in Romania or transiting through Romania.

The EC market tested the proposals.

Transgaz then offered revised commitments, which in March 2020 the EC accepted and made legally binding.[155] The final commitments provide that Transgaz will make available capacities at interconnection points for increased natural gas exports from Romania to Hungary and Bulgaria. More specifically, Transgaz has committed to:

- make available minimum export capacities of 1.75 bcm per year at the interconnection point between Romania and Hungary (Csanádpalota);
- make available minimum export capacities totalling 3.7 bcm per year at two interconnection points between Romania and Bulgaria (Giurgiu/Ruse and Negru Voda I/Kardam);
- ensure that its tariff proposal to ANRE would not discriminate between export and domestic tariffs; and
- refrain from using any other means of hindering exports.

The commitments will remain in force until December 2026 and a trustee will monitor their implementation and Transgaz’ compliance.

[152] With thanks to Alessia Varieschi. *Romanian gas interconnectors*—Case AT.40335. EC Press Release IP/18/5861, 21 September 2018. The Art.27(4) Notice is in [2018] OJ C342/2. The proposed commitments are available on the EC’s website.
[153] *Romanian gas interconnectors*Article 27(4) Notice at [7].
[154] *Romanian gas interconnectors*Article 27(4) Notice at [8].
[155] *Romanian gas interconnectors* EC Press Release IP/20/407, 6 March 2020.

The EC also noted that the final commitments provide for significant additional capacity compared to the market-tested commitments, in particular to Hungary, by including capacities envisaged for the Romanian section of the first phase of the Bulgaria-Romania-Hungary-Austria (BRUA) gas pipeline project.

Bulgarian Energy Holding It may be recalled that in December 2018 the EC imposed a fine of €77 million on Bulgarian Energy Holding and two of its subsidiaries (the "BEH group") for blocking competitors' access to key natural gas infrastructure in Bulgaria. In July 2020, the EC published the non-confidential version of its decision on its website.[156]

In its decision, the EC's decision found that:

- the BEH group held dominant positions both in the gas infrastructure markets and in the gas supply markets in Bulgaria;
- BEH and its subsidiaries abused their dominant positions by foreclosing entry into the gas supply markets in Bulgaria. They unduly restricted access to the infrastructure they owned and operated;
- BEH used the dominant position of its subsidiary Bulgartransgaz on gas infrastructure in Bulgaria to protect the near monopolistic position of its subsidiary Bulgargaz on the supply of gas there; and
- Bulgargaz also hoarded capacity on the only import pipeline bringing gas through Romania to Bulgaria so that it could not be used by potential competitors.

The EC found that, between July 2010 and January 2015, the BEH group's conduct amounted to an abusive refusal to supply, resulting in foreclosure of Bulgarian gas supply markets and an abuse of the BEH group's dominant position under art.102 TFEU.

The BEH group had blocked access to: (i) the domestic Bulgarian gas transmission network; (ii) the only gas storage facility in Bulgaria (the underground facility in Chiren); and (iii) the only import pipeline gas into Bulgaria, which BEH fully booked (Romanian Transit Pipeline 1).

Without access to this essential infrastructure, it was impossible for potential competitors to enter wholesale gas supply markets in Bulgaria.

The main points of interest in the decision are as follows.

First, as regards the domestic Bulgarian gas transmission network, the EC found a "clear pattern"[157] that the behaviour of Bulgartransgaz prevented or attempted to prevent third party access to the network, by: (i) failing to act in a transparent manner and to reply to access requests within the statutory deadlines;[158] (ii) making unreasonable requests with regard to access before treating access requests;[159] and (iii) deliberately misinterpreting access requests or providing erroneous information with regard to conditions for access.[160]

[156] With thanks to Alessia Varieschi and Su Şimşek. *BEH gas*—Case AT.39849, EC decision of 17 December 2018, available on the EC's website. EC Press Release IP/18/6846, 17 December 2018. See also John Ratliff "Major Events and Policy Issues in EU Competition Law 2018-2019: Part 2" [2020] I.C.C.L.R. 201, 231.
[157] *BEH gas* EC decision at [95].
[158] *BEH gas* EC decision at [101] and [139].
[159] *BEH gas* EC decision at [106], [138]–[141], and [155]–[156].
[160] *BEH gas* EC decision at [106(b)].

On the other hand, Bulgartransgaz was "more lenient" towards Bulgargaz, by processing its applications without any delays, providing services without signed contracts, and at times renewing Bulgargaz' access to the network on its own initiative.[161]

Similarly, the EC found "clear pattern[s]" in the BEH group's behaviour to prevent or attempt to prevent third party access to: (i) the gas storage facility in Chiren,[162] whereas it was lenient towards Bulgargaz;[163] and (ii) the Romanian Transit Pipeline 1,[164] to which Bulgargaz had access on an exclusive basis, at a fixed price, without regard to the volumes actually transmitted.[165] In particular, only one competitor was granted access to the transit pipeline in a non-transparent procedure and on a short-term basis, which did not allow Bulgargaz' competitor to compete with it effectively.[166]

Second, the EC considered that BEH had not only determined the course of action of its subsidiaries,[167] but had also directly participated in the access refusals and the capacity hoarding on the relevant gas infrastructure controlled by the BEH group.[168] The sporadic and selective granting of access to the Bulgarian transmission network did not change the EC's overall assessment.[169] In this context, the EC noted that BEH's approval of an access to the Romanian Transit Pipeline 1, which did not qualify as objective, transparent and non-discriminatory, only proved BEH's direct participation in the infringement.[170]

Third, the EC noted that the BEH group had not behaved like a "regular profit-maximising undertaking", which would be interested in providing services to many customers, but instead protected the market position of its gas supply-arm (Bulgargaz).[171]

Fourth, in showing that the BEH group had abused its dominant position, the EC noted that there is a regulatory obligation on a transmission system operator to provide third party access to the transmission network and storage; and the BEH group had implemented a consistent strategy of restricting access to the infrastructure that is needed to compete with the BEH group on the gas supply markets in Bulgaria.[172] Notably, the EC emphasised that where regulations impose an obligation on a dominant undertaking to provide access to its infrastructure, such regulations show that access to the relevant infrastructure is required for effective competition, and are relevant in the assessment of the abusive nature of the conduct.[173]

Fifth, as regards the duration of the infringement, the EC considered that at the latest, when the actual demand to access the relevant infrastructure materialised, the BEH group should have taken all the necessary steps to grant access to third

[161] *BEH gas* EC decision at [96]–[97].
[162] *BEH gas* EC decision at [178].
[163] *BEH gas* EC decision at [179] and [212].
[164] *BEH gas* EC decision at [273].
[165] *BEH gas* EC decision at [260].
[166] *BEH gas* EC decision at [274], [312]–[313] and [323].
[167] *BEH gas* EC decision at [374]–[392].
[168] *BEH gas* EC decision at [393]–[414].
[169] *BEH gas* EC decision at [408].
[170] *BEH gas* EC decision at [412].
[171] *BEH gas* EC decision at [451].
[172] *BEH gas* EC decision at [454].
[173] *BEH gas* EC decision at [465].

parties.[174] It was not relevant as of when the BEH group believed that a proper access request was made according to its rules.[175]

BEH has appealed.

Digital/Hi-Tech—Old

Box 15

- **European Commission Decisions—Article 102 TFEU—Old—Digital/Hi-Tech**
  - *Qualcomm*—Exclusivity payment
    - * Decision
    - * LTE chipsets
    - * NB. Even Apple found not to have countervailing buyer power because of Qualcomm's patents and "grant back" network etc.
    - * Critical margin analysis re. ability of an "as-efficient" competitor to compete profitably
  - *Qualcomm*—Predatory pricing
    - * Decision (372 pages!)
    - * UMTS chipsets
    - * Preventive actions to deny start-up Icera the means to get a foothold and develop
    - * Debate about whether LRAIC (long run average incremental costs, i.e. average variable cost, plus allocated development costs) was the right benchmark
  - Other—*AB InBev* decision
    - * Market division strategies
    - * Article 102 TFEU case because unilateral actions (large retailer would not agree not to export)
    - * Divergences in national laws re. discounting
    - * 15% fine reduction for cooperation

Qualcomm LTE Chipset Decision—Exclusivity Payments In June 2020, the EC published on its website the non-confidential version of its decision from January 2018 by which the EC fined Qualcomm €997.4 million for infringing art.102 TFEU.[176] It may be recalled that the EC found that Qualcomm abused its dominant position on the worldwide LTE chipset market by granting payments to Apple on condition that Apple obtain from Qualcomm all of Apple's requirements of LTE chipsets.[177]

Baseband chipsets are part of the mobile communications industry. The core component providing connectivity in a mobile device (e.g. smartphone, tablet, portable PCs) is the baseband processor. This processor is typically paired with two additional components to complete its functionality; their resulting combination

174 *BEH gas* EC decision at [645], [661] and [665].

175 *BEH gas* EC decision at [663].

176 With thanks to Georgia Tzifa. Case AT.40220—*Qualcomm* (Exclusivity payments). The EC's summary is in [2018] OJ C269/25. The non-confidential version of the decision is available on the EC's website.

177 *Qualcomm* EC Decision at [388].

is called a "baseband chipset". While all mobile devices incorporate baseband chipsets, they do not all require the exact same functionalities.[178]

Baseband chipsets implement one or multiple cellular and wireless communications standards. The EC decision in this case concerns baseband chipsets that implement and comply with the LTE standard.[179]

The main points of interest on the EC's decision are as follows:

First, the EC found Qualcomm to have been dominant in the worldwide LTE chipset market between January 2011 and December 2016.[180] This was based on Qualcomm's consistently high market share by reference to both value and volume.[181] Furthermore, Qualcomm's influence on the development of LTE technology was considered to give it a lasting worldwide advantage throughout the period concerned.[182]

The EC also noted the existence of barriers to entry and expansion in the market:

- A new supplier of LTE chipsets needs to undertake significant initial investments in design-related R&D activities before it can launch its first product.[183]
- Qualcomm holds a large portfolio of patents. When it agrees cross-licences with other holders of intellectual property rights (IPR) in, among others, the LTE standard, Qualcomm systematically requests and obtains the right of pass-through of the other party's IPR to Qualcomm's chipset customers. The EC considered this "grant-back network" to constitute a barrier to entry and expansion because competing LTE chipset suppliers were unable to offer a similar level of pass-through rights.[184]

Other barriers to entry and expansion noted by the EC were certification requirements for baseband chipsets, Qualcomm's brand image, reputation and strong business relationships, and the need for suppliers to supply chipsets supporting a variety of standards.

Second (and importantly given the size of Apple), the EC also found that the potential commercial strength of Qualcomm's baseband chipset customers was not capable of affecting Qualcomm's dominant position.[185] This included noting a statement by Apple that Qualcomm's dominant position in [baseband chipsets] and SEPs [standard essential patents] made it "extremely difficult to exert pressure on Qualcomm concerning price and other key elements during negotiations".[186]

Third, the EC noted the various agreements and payments concerned in the case. In December 2009, Apple had concluded the "Strategic Terms Agreement" with

[178] *Qualcomm* EC Decision at [71]–[78].
[179] *Qualcomm* EC Decision at [53] and [79]–[80]. There is extensive discussion and debate on product market definition, some 28 pages of the decision, see section 9.
[180] *Qualcomm* EC Decision at [305].
[181] *Qualcomm* EC Decision at [310] and [313]: "Qualcomm's market share by reference to value was above [60-70]% between 2011 and 2016 and above [90–100]% until 2014. Moreover, until 2014, none of Qualcomm's competitors had a market share exceeding [0–10]% and thereafter, only MediaTek's share was above [0–10]%. Qualcomm's market share by reference to volume was above [60–70]% between 2011 and 2016 and above [80–90]% until 2015."
[182] *Qualcomm* EC Decision at [129]–[133] and [315].
[183] *Qualcomm* EC Decision at [326]–[330].
[184] *Qualcomm* EC Decision at [331]–[345].
[185] *Qualcomm* EC Decision at [368]–[376].
[186] *Qualcomm* EC Decision at [369].

Qualcomm. This framework agreement contained terms and conditions relating to the sale of Qualcomm chipsets to contract manufacturers. Subsequently, Apple and Qualcomm entered into the "Transition Agreement" in February 2011. The Transition Agreement was amended in February 2013, by means of the First Amendment thereto.[187]

In summary, the Transition Agreement and the First Amendment ("the Agreements") provided that:

- Qualcomm would grant Apple certain lump-sum, volume-based and per-device payments;
- these payments were conditional upon Apple obtaining from Qualcomm all of Apple's requirements of baseband chipsets. In the event that Apple commercially released a product that incorporated a non-Qualcomm baseband chipset, the Agreements would terminate and Qualcomm would not have to make any of the payments that were otherwise due and payable after the date of such release; and
- furthermore, if that commercial release took place between 2013 and 2015, Apple would be obliged to reimburse part of the payments previously received from Qualcomm.[188]

The Agreements were scheduled to expire in December 2016. However, for the purposes of its decision, the EC considered that they terminated in September 2016, following Apple's launch of iPhone 7 devices incorporating Intel LTE chipsets.[189]

Pursuant to the Agreements, Qualcomm paid Apple a total of USD [2–3] billion between 2011 and 2015. However, these payments ceased after the termination of the agreements in September 2016.[190]

Fourth, turning to the legal tests for abuse, the EC recalled that, on the case law, exclusivity rebates and payments are presumptively abusive under art.102 TFEU.

Noting *Intel*,[191] the EC sets out that where a dominant undertaking concerned seeks to rebut this presumption by submitting, during the administrative procedure, on the basis of supporting evidence, that its exclusivity rebates/payments were not capable of restricting competition and, in particular, of producing the alleged foreclosure effects, the EC is required to undertake a review thereof. Notably, the EC has to analyse the extent of the undertaking's dominant position on the relevant market; the share of the market covered by the exclusivity rebates/payments; the conditions and arrangements for granting the rebates/payments in question; their duration and amount; as well as the possible existence of a strategy aiming to exclude as-efficient competitors from the market.[192]

The analysis of the capacity to foreclose is also relevant in assessing whether a system of exclusivity rebates and payments which in principle falls within art.102 TFEU could be objectively justified.

[187] *Qualcomm* EC Decision at [135]–[141].
[188] *Qualcomm* EC Decision at [167]. For more details, see [143]–[166].
[189] *Qualcomm* EC Decision at [142].
[190] *Qualcomm* EC Decision at [172]–[173].
[191] *Intel* (C-413/14 P) EU:C:2017:632, Judgment of 6 September 2017, at [138]–[140].
[192] *Qualcomm* EC Decision at [382]–[383].

The exclusionary effect arising from such rebates and payments also may be counterbalanced or outweighed by advantages in terms of efficiency which also benefit the consumer. That balancing of the favourable and unfavourable effects of the exclusivity rebates and payments on competition can be carried out in the EC's decision only after an analysis of the intrinsic capacity of those rebates/payments to foreclose as-efficient competitors.[193]

Fifth, based on this legal test, the EC concluded that Qualcomm had abused its dominant position on the worldwide market for LTE chipsets by granting payments to Apple on condition that Apple obtain from Qualcomm all its requirements of LTE chipsets. The EC also considered that the presumption of unlawfulness was borne out in the circumstances of this specific case by the EC's analysis of the capability of the payments in question to have anti-competitive effects.[194]

More specifically, the EC found that:

First, Qualcomm's payments reduced Apple's incentives to switch to competing LTE chipset suppliers. This was confirmed by Apple's internal documents and explanations provided during the administrative procedure. The evidence showed that Intel's LTE chipsets had been evaluated seriously by Apple for use in devices launched in 2014 and 2015. However, after the signature of the First Amendment to the Transition Agreement in February 2013, which offered Apple additional incentives to use Qualcomm's chipsets exclusively in its devices, Apple ceased all consideration of alternative baseband chipset vendors to Qualcomm for 2014 and 2015 mobile devices.[195]

Second, Qualcomm's exclusivity payments covered a significant share of the market. During the period concerned, these payments covered up to [40-50]% and approximately [25-35]% on average of the worldwide market for LTE chipsets.

Furthermore, the EC considered that the payments were granted during a strategic time period. While LTE chipset sales amounted in 2011 to only USD [100-200] million, they reached USD [10,000-20,000] million in 2016 after years of constant growth, representing a total increase of approximately [9,500-10,500]% over the period 2011 to 2016 and an average yearly increase of approximately [125-175]%.[196]

Third, Apple is an attractive customer for LTE chipset suppliers because of its importance for entry or expansion in the worldwide market. Supplying Apple with LTE chipsets would have helped competing suppliers achieve scale; reduced their R&D expenditure; and allowed them to increase their ability to compete. Moreover, because of Apple's reputation and role in the development of innovative products, supplying Apple with LTE chipsets would have allowed competing suppliers to improve their credibility and reputation.[197]

Based on this analysis, the EC concluded that Qualcomm's exclusivity payments were capable of having anti-competitive effects.[198]

Sixth, as part of Qualcomm's argument that its exclusivity payments did not have and were incapable of having anti-competitive effects, Qualcomm submitted a "*critical margin analysis*" to show that an as-efficient competitor could profitably

[193] *Qualcomm* EC Decision at [384]–[387].
[194] *Qualcomm* EC Decision at [388]–[390].
[195] *Qualcomm* EC Decision at [407]–[408] and [412]–[465].
[196] *Qualcomm* EC Decision at [471].
[197] *Qualcomm* EC Decision at [410] and [474]–[485].
[198] *Qualcomm* EC Decision at [486].

compete to supply Apple with baseband chipsets. Qualcomm's analysis was claimed in substance to show that, had Apple taken the decision to switch as of a given year between 2012 and 2015, a hypothetical competitor, assumed to have the same average variable costs (AVC) as Qualcomm, would have been able to cover those costs when supplying LTE chipsets over one, two or three annual generations of iPhones.[199]

According to the EC, however, Qualcomm's critical margin analysis did not support the company's claims, because it was based on "unrealistic/incorrect assumptions".[200] In particular, it failed to consider the following elements:

First, a measure of costs that would take into account a share of fixed costs, including, at least some part of R&D expenses.

Second, the fact that only Apple's requirements of LTE chipsets for iPads yet to be launched were contestable in 2012, 2013, 2014, 2015 and 2016; and for iPhones, the only part of Apple's requirements for LTE chipsets for iPhones that was contestable was [50–60]% of its 2016 requirements.

Third, the fact that, had Apple taken the decision to switch as of a given year between 2012 and 2015, Apple would have also foregone payments in relation to upcoming iPhone and iPad generations.[201]

The EC found that, if Qualcomm's analysis had been based on these more accurate assumptions, it would have indicated that a hypothetical competitor with the same AVC as Qualcomm would have been unable to cover its AVC when supplying LTE chipsets as of 2013, 2014 and 2015.[202]

The EC also stated that, even if Qualcomm's analysis had been based on these more accurate assumptions and therefore shown that a hypothetical competitor with the same AVC as Qualcomm might have been able to cover its AVC when supplying LTE chipsets as of 2012, this would still not support Qualcomm's claim that its exclusivity payments were incapable of having anti-competitive effects. The analysis would still be based on other incorrect assumptions, favourable to Qualcomm.[203]

Finally, the EC rejected Qualcomm's argument that any exclusionary effect of its payments was counterbalanced or outweighed by advantages in terms of efficiencies that also benefit the consumer.[204] Notably, Qualcomm claimed that it would not have made significant relationship-specific investments in order to develop customised Mobile Data Modem (MDM) chipsets for Apple, but for the exclusivity payments.[205] The EC did not agree that such exclusivity payments were necessary in such circumstances and considered that Qualcomm had not shown it.[206] On the contrary, there were several other buyers of MDM baseband chipsets, which accounted for between [20–30]% and [75–85]% of Qualcomm's revenue from the sale of MDM chipsets throughout the duration of the Transition

[199] *Qualcomm* EC Decision at [487].
[200] *Qualcomm* EC Decision at [488]–[489] and [496]–[497].
[201] *Qualcomm* EC Decision at [495]. For more details, see [490]–[494].
[202] *Qualcomm* EC Decision at [498]–[499].
[203] *Qualcomm* EC Decision at [500]–[503].
[204] *Qualcomm* EC Decision at [504].
[205] *Qualcomm* EC Decision at [505]–[510].
[206] *Qualcomm* EC Decision at [511]–[523].

Agreement. Also, competing LTE chipset suppliers had not required exclusivity payments for their supply to Apple.[207]

Qualcomm UMTS Chipset Decision—Predatory Pricing In July 2020, the EC also published its 372-page decision from July 2019 in the Qualcomm predatory pricing case.[208] This decision was outlined last year based on the EC Press Release.[209] It will be recalled that Qualcomm was fined €242 million.

The main points on the EC decision are as follows:

First, the EC found that Qualcomm had infringed art.102 TFEU and art.54 of the EEA Agreement by supplying certain quantities of three of its UMTS compliant chipsets (the MDM8200, MDM6200 and MDM8200A based chipsets) to two of its key customers, Huawei and ZTE, below cost, with the intention of eliminating Icera.

Icera was Qualcomm's main competitor at that time in the market segment offering advanced data rate performance ("the leading-edge segment") and a start-up based in Bristol in the UK. (It was later acquired by Nvidia.) The infringement was found to have lasted from July 2009 to June 2011.[210]

Second, Qualcomm made several claims of procedural irregularities. Notably, since the EC's investigation lasted more than ten years, Qualcomm claimed that the EC had failed to conduct a proper and timely investigation.[211]

The EC rejected this, noting that the duration of the investigation reflected the complexity of the predatory pricing allegations made by Icera/Nvidia.[212]

Further, the EC stated that the duration of the investigation had reflected the extent to which Qualcomm had been willing to cooperate with the EC. According to the EC, throughout the investigation, Qualcomm had shown a certain reluctance to provide the EC with the information that the EC considered necessary, notably for establishing an appropriate cost measure in relation to the products under investigation.[213] The EC also considered that the duration of the investigation was affected by the choices made by Qualcomm in its defence strategy. For example, following the adoption of the SO, Qualcomm chose to engage in an extensive exchange of correspondence.[214]

Qualcomm also claimed that it was not given sufficient time to respond to the SO and to the Supplementary SO (SSO).[215]

The EC rejected those claims. As regards the SO, the EC considered that the time period of four months initially granted to Qualcomm for responding to the EC's objections was, despite the "limited" length of the SO (119 pages), already longer than usual. The time to respond was subsequently extended to an overall period of eight months. Qualcomm's response of 335 pages, excluding annexes, suggested that it had been able to exercise its rights of defence.[216]

207 *Qualcomm* EC Decision at [524]–[525].
208 With thanks to Édouard Bruc. Case AT.39711—*Qualcomm* (predation). The decision is available on the EC website. The EC summary is in [2019] OJ C375/25.
209 *Qualcomm* (predation) EC Press Release IP/19/4350, 18 July 2019.
210 *Qualcomm* (predation) EC summary, points 1, 2 and 10.
211 *Qualcomm* (predation) EC decision at [34].
212 *Qualcomm* (predation) EC decision at [36].
213 *Qualcomm* (predation) EC decision at [37].
214 *Qualcomm* (predation) EC decision at [39].
215 *Qualcomm* (predation) EC decision at [41].
216 *Qualcomm* (predation) EC decision at [42].

As regards the SSO, the EC noted that it was essentially similar to the SO, save that it included a revised price-cost test and more extensive analysis of the documentary evidence. Qualcomm was given extensions allowing it some 12 weeks to respond. Again the EC considered that Qualcomm's response, this time of 379 pages excluding annexes (as compared to the SSO of 287 pages) suggested that Qualcomm had been able to exercise its rights of defence.[217]

Third, the EC found that Qualcomm held a dominant position in the worldwide market for UMTS chipsets, at least from January 2009 to December 2011.[218] The relevant product market was the merchant market for slim and integrated baseband chipsets that are compliant with the UMTS standard ("UMTS chipsets").[219]

The EC noted that the value-based market share of Qualcomm was between 59.7% and 62.5% between 2009 and 2011. Moreover, during that period, all of Qualcomm's competitors had a market share of less than one third of Qualcomm's market share, with no competitor exceeding 20%.[220] The position was similar on a volume-based assessment.[221]

The EC also considered that the worldwide market for UMTS chipsets was characterised by the existence of a number of barriers to entry and expansion (e.g. significant initial investments in research and development to design UMTS chipsets, and various barriers related to Qualcomm's intellectual property rights) (IPR).

As in the exclusive payments case, the EC noted that Qualcomm held a large portfolio of patents[222] and had obtained the right of pass-through of the other party's IPR to Qualcomm's chipset customers, through a network of grant-back contractual clauses. This "grant-back network" was considered to constitute a barrier to entry because competing UMTS chipset suppliers were unable to offer a similar level of pass-through rights.[223] Qualcomm's brand image, reputation and strong business relationships also constituted a barrier to entry and expansion.[224]

The commercial strength of Qualcomm's chipset customers was also not considered capable of affecting Qualcomm's dominant position during that period.[225]

Fourth, turning to whether Qualcomm had abused its dominant position, the EC recalled the general principles on predatory and selective pricing, based notably on *AKZO*.[226] The EC found that Qualcomm had abused its dominant position by supplying certain quantities of three of its UMTS chipsets to two of its key customers below cost, with the intention of eliminating Icera.[227]

The EC considered that Qualcomm's pricing practices took place as Icera increased its "market traction" as a viable supplier of leading edge UMTS chipsets,

[217] *Qualcomm* (predation) EC decision at [43].

[218] *Qualcomm* (predation) EC summary, points 6–9.

[219] *Qualcomm* (predation) EC decision at [178].

[220] *Qualcomm* (predation) EC decision at [272]. The EC considered that it was not required to carry out a SSNIP test, insofar as, among other reasons, that test is not the only method available to the EC when defining the relevant product market ([180] and [245]–[248]). The EC also considered that it might not be appropriate since Qualcomm's prices might already have been set at a supra competitive level, given Qualcomm's dominance.

[221] *Qualcomm* (predation) EC decision at [275].

[222] The EC noted that Qualcomm is the largest IPR holder active in the supply of baseband chipsets (in 2015, it owned more than 100,000 patents, see *Qualcomm* (predation) EC decision at [111]).

[223] *Qualcomm* (predation) EC decision at [284]–[296].

[224] *Qualcomm* (predation) EC decision at [303]–[310].

[225] *Qualcomm* (predation) EC decision at [316].

[226] *Qualcomm* (predation) EC decision at [326]–[333]. *AKZO Chemie BV v Commission of the European Communities* (C-62/86) EU:C:1991:286; [1993] 5 C.M.L.R. 215, Judgment of 3 July 1991.

[227] *Qualcomm* (predation) EC decision at [1] and [334].

which posed a growing threat to Qualcomm's chipset business. To ensure that Icera's business could not reach a size critical to Qualcomm's market position, the EC found that Qualcomm pursued "preventive actions", which were targeted and selective, offering price concessions to its two main customers for MBB devices, Huawei and ZTE, with regard to the MDM8200, MDM6200 and MDM8200A based chipsets (in the leading edge segment).[228]

Icera was considered to be a small and financially constrained start-up. Qualcomm considered that Icera's development prospects were dependent on developing a business relationship with either of these strategically important customers.[229]

The EC found that Qualcomm's preventive actions were based on a multi-chipset strategy covering its three leading edge chipsets, which competed with Icera's most advanced chipsets at the time. Qualcomm aimed to protect its position on the high-volume segment of chipsets for mobile phones, which Icera was planning to enter once it would have obtained a foothold in the segment of chipsets for use in mobile broadband devices.[230]

The EC sets out a detailed price-cost review in its decision.[231] There is extensive explanation and debate concerning whether LRAIC (i.e. long-run average incremental cost, essentially average variable cost, plus allocated developments costs) is the most appropriate cost benchmark in the case.[232]

The EC states that it took LRAIC as the cost test, because Qualcomm is a multi-product undertaking which benefits from economies of scope, i.e. some of its business operations did not have to be replicated for each individual product, but could be shared by all products supplied by Qualcomm.

The costs incurred for such operations did not vary with the number of different products supplied (common costs) and were therefore not taken into account in LRAIC because the latter only comprises the production costs specific to the products under investigation. The average of all variable and fixed costs that Qualcomm incurred to produce a particular product (i.e. LRAIC) was below average total cost (ATC) for each individual product.[233]

The EC concluded that its analysis of the prices charged by Qualcomm to Huawei and ZTE, and Qualcomm's costs for the manufacturing of these three chipsets, demonstrated that Qualcomm sold certain amounts of these chipsets below LRAIC,[234] and, in any case, below average total costs (ATC),[235] as well as a limited amount of MDM6200 based chipsets below average variable costs (AVC), with the intention of eliminating Icera.[236]

The EC also noted that the results of its price-cost test were consistent with its review of internal documents, which evidenced the intention to eliminate Icera.[237]

[228] *Qualcomm* (predation) EC decision at [335] and [399]–[406].
[229] *Qualcomm* (predation) EC summary, point 12.
[230] *Qualcomm* (predation) EC summary, point 12, EC decision at [407].
[231] For the purposes of the price-cost test in this case, the EC carried out a reconstruction of the net average selling prices ("Net ASPs") effectively paid to Qualcomm by Huawei and ZTE for each of the chipsets under investigation during the relevant period (EC decision at [589]).
[232] *Qualcomm* (predation) EC decision at [780]–[796].
[233] *Qualcomm* (predation) EC decision at [780].
[234] See e.g. *Qualcomm* (predation) EC decision at [951]–[952], [967], [974].
[235] *Qualcomm* (predation) EC decision at [1115].
[236] *Qualcomm* (predation) EC summary, point 13.
[237] *Qualcomm* (predation) EC decision at [1117] and [1118].

The EC notes various statements in internal documents throughout its decision and highlights some in a final section on intent.[238] For example, that in one email, Qualcomm feared that once Icera would reach significant sales volumes, "the current data card market structure may undergo drastic changes and the price war will be unavoidable". In another email, an employee highlights that Qualcomm did not "want to see any break through of Icera in any of our major OEMs".[239] Furthermore, "as it is so dangerous for us, I would suggest we take some preventive actions to make it no chance to come true" [240], or "burn out Icera's limited funds from VC [venture capital], squeeze ICE8042/ZTE market space".[241]

Finally, the EC concluded that Qualcomm did not provide a valid objective justification or efficiency defence for its conduct.[242]

Other In November 2019, the EC published its summary in the *Google Android* case.[243]

Other—Old

Box 16

- **European Commission Decisions—Article 102 TFEU—Old—Other**
  - *AB InBev* decision
    - Market division strategies
    - Article 102 TFEU case because unilateral actions (large retailer would not agree not to export)
    - 15% fine reduction for cooperation

AB InBev In December 2019, the EC published on its website its decision from May 2019 in the *AB InBev* case.[244] It may be recalled that the EC found that AB InBev abused its dominant position on the Belgian beer market by hindering imports of its beer from neighbouring countries, in breach of EU antitrust rules. The EC fined AB InBev just over €200 million.

The main points of interest are as follows:

First, the EC found that AB InBev held a dominant position in the off-trade wholesale beer market in Belgium (i.e. retailers and wholesalers selling to convenience stores for consumption outside licensed premises). The EC found that AB InBev had market shares constantly above 50% and an ability to increase prices independently from other manufacturers.[245]

Second, the EC also noted that, although AB InBev faced large customers, including the Dutch retail chain Albert Heijn (which also operated in Belgium), these did not have countervailing buyer power, given the strength of AB InBev's

[238] *Qualcomm* (predation) EC decision.
[239] *Qualcomm* (predation) EC decision at [384] and [1122].
[240] *Qualcomm* (predation) EC decision at [1122].
[241] *Qualcomm* (predation) EC decision at [512] and [1127].
[242] *Qualcomm* (predation) EC decision at section 12.9.
[243] *Google Android* —Case AT.40099, [2019] OJ C402/19.
[244] With thanks to Édouard Bruc. *AB InBev Beer Trade Restrictions*—Case AT.40134. The EC's summary is in [2019] OJ C407/6. The non-confidential version of the decision is available on the EC's website.
[245] *AB InBev Beer Trade Restrictions* EC decision at [67]–[77].

Jupiler brand and of its other beers, which were considered "essential products" for the retailers' shelves.[246] (Albert Heijn appear to have resisted AB InBev's demands to some extent, but the EC's point was that AB InBev then took unilateral action to achieve its aims.[247])

Third, it appears prices in Belgium were higher than in the Netherlands and France. That was partly driven by a varied regulatory context. Notably, in Belgium by law retailers could not sell below cost, defined as the wholesale price, not including some promotional discounts and investment by a manufacturer. Whereas there was no such restriction in the Netherlands. Prices in the Netherlands could therefore be materially lower.[248]

Fourth, the EC noted that a practice designed to partition national markets was a restriction by object.[249] Further, that such practices through unilateral conduct of a dominant undertaking could be considered an abuse "by nature", insofar as they are capable of restricting competition.[250] Also that a practice may amount to an infringement of both arts 101 and 102 TFEU.[251]

Fifth, the EC considered that actions by AB InBev in markets where it may not be dominant, in order to protect its position where it is dominant, could be abusive[252], applying *Telia Sonera*[253]and *Tetra Pak*.[254]

Sixth, the EC found that AB InBev had abused its dominant market position in Belgium by pursuing a deliberate strategy to restrict the possibility for supermarkets and wholesalers to buy its Jupiler beer at lower prices in the Netherlands and to import it into Belgium. The overall objective of this strategy was to maintain higher prices in Belgium.[255]

The EC reviewed at length evidence of AB InBev's aims.[256] The EC then describes AB InBev's conduct in detail and found that AB InBev had used four different ways to achieve them:[257]

- AB InBev changed the packaging of some of its Jupiler beer products supplied to retailers and wholesalers in the Netherlands to make these products harder to sell in Belgium, notably by removing the French version of mandatory information from the label, as well as changing the design and size of beer cans (for example, offering smaller Jupiler cans in the Netherlands to those used in Belgium,

[246] *AB InBev Beer Trade Restrictions* EC decision at [24] and [75].
[247] *AB InBev Beer Trade Restrictions* EC decision at [132]–[133].
[248] *AB InBev Beer Trade Restrictions* EC decision at [35]–[37].
[249] See, e.g. *Sot Lelos kai Sia EE v GlaxoSmithKline AEVE Farmakeftikon Proionton (formerly Glaxowellcome AEVE)* (Joined Cases C-468/06 to C-478/06) EU:C:2008:504; [2008] 5 C.M.L.R. 20, Judgment of 16 September 2008, at [66].
[250] *AB InBev Beer Trade Restrictions* EC decision at [89]–[93].
[251] *AB InBev Beer Trade Restrictions* EC decision at [87]–[88]. *Compagnie Maritime Belge Transports SA v Commission of the European Union* (Joined Cases C-395/96 P and C-396/96 P) EU:C:2000:132; [2000] 4 C.M.L.R. 1076, Judgment of 16 March 2000, at [33].
[252] *AB InBev Beer Trade Restrictions* EC decision at [86].
[253] *Konkurrensverket v TeliaSonera Sverige AB* (C-52/09) EU:C:2011:83; [2011] 4 C.M.L.R. 18, Judgment of 17 November 2011, at [84]–[86].
[254] *Tetra Pak International SA v Commission of the European Communities* (C-333/94 P) EU:C:1996:436; [1997] 4 C.M.L.R. 662, Judgment of 14 November 1996, at [25].
[255] *AB InBev Beer Trade Restrictions* EC decision at [2] and [95].
[256] *AB InBev Beer Trade Restrictions* EC decision at [94]–[113].
[257] *AB InBev Beer Trade Restrictions* EC decision at [207], [114]–[173] and [174]–[197].

making them less appealing to consumers in Belgium, who were used to a larger can);[258]
- AB InBev limited the volumes of Jupiler beer supplied to a wholesaler in the Netherlands, to restrict imports of these products into Belgium;
- AB InBev refused to sell a number of its products, which it was very important for retailers in Belgium to have on their shelves, to one retailer unless the retailer agreed to limit its imports of less expensive Jupiler beer from the Netherlands to Belgium;[259] and
- AB InBev made customer promotions for beer offered to a retailer in the Netherlands conditional upon the retailer not offering the same promotions to its customers in Belgium.

The EC concluded that these actions amounted to a single and continuous infringement[260] and that AB InBev had abused its dominant position from February 2009 until October 2016.

Seventh, after the SO was sent, AB InBev made a formal offer to cooperate.[261] AB InBev acknowledged the infringement and offered remedies to prevent the infringement happening again, by changing the packaging of its beer products.

In its decision, the EC made the proposed remedies binding for a period of five years. AB InBev undertook to include mandatory food labelling information both in Dutch and French, as opposed to just one language, on the packaging of all its current and new products of 19 specific beer brands in Belgium, France and the Netherlands.

Finally, as regards the fine, the EC took the proportion of value of sales for gravity as 10% (similar to other vertical cases but on the high end) and increased the fine on AB InBev for deterrence, in view of its size. In the light of AB InBev's cooperation, the EC reduced the fine on AB InBev by 15%, pursuant to point 37 of the EU Fining Guidelines.[262]

Sectoral Review

Box 17

- **Sectoral Review and Policy**
  - The Internet of Things sectoral inquiry
  - Competition policy in (at least) a four-factor dynamic
    - COVID-19, the digital economy, climate change and globalisation
  - EC Initiatives re. Digital Markets
    - A Digital Markets Act
      - Digital gatekeepers/blacklists/greylists
      - An ex ante competition tool?

[258] *AB InBev Beer Trade Restrictions* EC decision at [143].
[259] *AB InBev Beer Trade Restrictions* EC decision at [158]–[168] and [190], [195].
[260] *AB InBev Beer Trade Restrictions* EC decision at [208]–[214].
[261] *AB InBev Beer Trade Restrictions* EC decision at [17]–[19].
[262] *AB InBev Beer Trade Restrictions* EC decision at [261].

* A Digital Services Act
  - Digital platforms regulation
- Competition law and foreign subsidies

The Internet of Things

In July 2020, the EC launched a sectoral antitrust inquiry into the Internet of Things, that is, systems of interrelated, internet-connected objects that are able to collect and transfer data over a wireless network for consumer-related products and services in the EU. The sector inquiry focuses on consumer-related products and services that are connected to a network and can be controlled at a distance, for example via a voice assistant or mobile device.[263]

The range of products or services covered by the sector inquiry is broad. It includes:

- wearable devices (e.g. smart watches or fitness trackers);
- connected consumer devices used in the "smart home" context (e.g. fridges, washing machines, smart TVs, smart speakers and lighting systems);
- services available via smart devices (e.g. food delivery, music and video streaming services); and
- the voice assistants used to access them (e.g. the EC mentions Apple's Siri, Google's Assistant, Amazon's Alexa or Deutsche Telekom's Magenta).

However, connected cars are not covered. They are subject to separate European initiatives (i.e. another public consultation[264]).

In presenting the inquiry, Executive Vice-President Vestager highlighted issues such as possible restrictions of data access, interoperability, exclusivity, possible self-preferencing, and practices linked to the use of proprietary standards as potential points of discussion.

Mrs. Vestager stated, as she announced the inquiry, that

> "big companies could misuse the data collected through such devices, to cement their position in the market against the challenges of competition. They might even use their knowledge of how we access other services to enter the market for those services and take it over … we know there's a risk that some of these players could become gatekeepers of the Internet of Things, with the power to make or break other companies."[265]

She then added that, due to that risk, timely intervention is needed to avoid this happening with the Internet of Things.

[263] With thanks to Édouard Bruc. EC Press Release IP/20/1326, 16 July 2020.

[264] European Commission, *Summary Report on the open public consultation on Connected and Automated Mobility (CAM)* (18 December 2019), available at: *https://ec.europa.eu/digital-single-market/en/news/summary-report-open-public-consultation-connected-and-automated-mobility-cam* [Accessed 6 February 2021].

[265] European Commission, "Statement by Executive Vice-President Margrethe Vestager on the launch of a Sector Inquiry on the Consumer Internet of Things", (Brussels, 16 July 2020), available at: *https://ec.europa.eu/commission/presscorner/detail/en/speech_20_1367* [Accessed 6 February 2021].

The inquiry appears to fit with the EC's known concerns in the digital area concerning ecosystem competition, gatekeepers and the risk of markets tipping to being dominated by a leading market player.

It also appears directed to general fact-finding as the EC works deeper into digital issues. For example, in its questions the EC focuses on the interaction of wearable devices with smartphones, asking whether devices work independently or need an app and registration to work. If the company has an app, the EC asks for details as to how the app is placed on smartphones, how it is monetised, how updates are handled, and what operating systems it runs on. Companies are also asked for details of any technical difficulties in the past. The EC also asks which search engine is automatically selected when a user browses the internet; which app is used to create a shopping list or indicate sleep patterns; and which service provides payment functionality or streams music and podcasts.

The EC indicated that it had already sent out questionnaires to some 400 companies (big and small, in Europe, Asia and America) asking for replies by mid-October.[266] The EC expects to publish a preliminary report on the replies for consultation in the spring of 2021. The final report would follow in the summer of 2022.

Policy and Reports

Competition Policy in (at least) a Four-Factor Dynamic

These are challenging times for competition policy. At macro level there appear to be at least four major factors in play:

First, the *impact of the COVID-19 crisis*, which has distorted the factual and competition landscape from its previous "normal". Some specific elements of competition enforcement in this context have been highlighted above, that is, authorisation of temporary emergency cooperation, the suspension of the application of EU competition law in some agricultural sectors, and NCA interventions to prevent excessive exploitation of particular demands until normal equilibria are re-established.

However, this is only part of the impact of the COVID-19 crisis, as some industries/companies have been forced to hibernate, restructure and/or face closure. To assist, the EU and the Member States have intervened through very significant subsidies. Other sectors have been favoured by circumstances through their online offers. In some cases, aid also has been conditioned on specific competition remedies such as airline slot release.[267]

Second, before all that started, the next competition agenda was about the EU (and other jurisdictions) working out what, if anything, should be done about the *importance of and growth in the digital economy*. EC initiatives in this area are outlined in the next section (and the last one on the "Internet of Things" sectoral review).

[266] See further, MLex, "Internet of Things probe starts with EU questions over defaults, data, collection and standards" (17 July 2020); MLex, "Music, food delivery, taxis others catch EU eye in Internet of Things probe" (22 July 2020); and MLex, "Makers of smartwatches, fitness devices queried in EU's Internet of Things inquiry" (23 July 2020).

[267] See e.g. EC Press Release IP/20/1179, 25 June 2020.

Third, before all that started, probably the top agenda item for this Commission was addressing *climate change*, to which it had responded with its "*Green Deal*" proposals (borrowing the term from US Democrat initiatives).[268]

In EU competition law this has come into play most obviously in discussions about how to promote sustainability in the context of the EU's review of the rules applicable to horizontal restraints (as noted in Part 1 of this article in last month's journal).

However, again, this is only part of what is going on, as "green policies" have also been applied in, for example, grants of state aid. A notable example being the French requirement that airline aid be conditional on the closure of flights on routes within France which could be well served with a better carbon footprint, by fast trains.[269]

Fourth, the issue of *globalisation* has again come to the fore. Partly this is driven by COVID-19 issues, as some have expressed concern that essential medical supplies be available in Europe, rather than having to be imported, or sourced in world markets, with less certainty of success.[270]

Partly, as some have expressed concern about "strategic" European assets being acquired cheap by non-European buyers in the wake of the COVID-19 crisis, which has led to an expansion of many Member State laws on clearance of investments in strategic sectors, in particular to medical, biopharma and hi-tech areas.[271] At the same time, the EU Regulation on the coordination of review of such "foreign investment screening" came into force in October 2020.[272]

Beyond this, there have been discussions about *unfair subsidy competition in the globalisation context*. There is discussion of measures to address foreign subsidisation of companies investing in Europe, which we describe further below. There is also the EC's review of the Market Definition Notice, partly to see if it sufficiently takes into account global competition (as noted in Part 1 of this article in last month's journal).

All this suggests that competition policy is in a phase of huge dynamics and that competition law has to be considered in a wider regulatory perspective now, probably more than has happened for some time.

[268] See the EC's webpage for the Green Deal, available at: *https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en* [Accessed 6 February 2021].

[269] See Reuters, "Air France must cut emissions, domestic flights for aid: minister" (29 April 2020), available at: *https://uk.reuters.com/article/us-health-coronavirus-france-economy/air-france-must-cut-emissions-domestic-flights-for-aid-minister-idUKKBN22B2EL* [Accessed 6 February 2021].

[270] See Commissioner Thierry Breton, "EU industrial supply lines need strengthening, commissioner warns", *Financial Times* (4 May 2020), available at: *https://www.ft.com/content/5e6e99c2-4faa-4e56-bcd2-88460c8dc41a* [Accessed 6 February 2021].

[271] See N. van den Broek, C. Duvernoy, M. Seyfarth and S. Sprinkle, "COVID-19: EU Issues Guidelines Regarding Screening Foreign Investment in Connection With Industries Critical for Combating COVID-19", *WilmerHale* (27 March 2020), available at *https://www.wilmerhale.com/en/insights/client-alerts/20200327-eu-issues-guidelines-regarding-screening-foreign-investment-in-connection-with-industries-critical-for-combating-covid-19* [Accessed 6 February 2021].

[272] EC Press Release IP/20/1867, 9 October 2020; Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investment into the EU, [2019] OJ L79/1.

Recent EC Initiatives for Digital Markets

Recently, the EC has engaged in a broad review of EU competition policy and instruments relating to the digital economy.[273] The EC has concluded that ensuring the contestability and fair functioning of markets across the economy is likely to require a holistic and comprehensive approach, with an emphasis on the following three pillars:

(1) The continued vigorous enforcement of arts 101 and 102 TFEU, including the use of interim measures and restorative remedies, where appropriate.

(2) Possible ex ante regulation of digital platforms, including additional requirements for those that play a gatekeeper role.

(3) A possible new ex ante competition tool to deal with structural competition problems.

In June 2020, the EC launched separate parallel consultations on the second and third pillars, after publishing impact assessments for each. Stakeholders were invited to submit their comments by September 2020.[274]

Following these consultations, the EC announced that it was working on two separate pieces of legislation, the *Digital Markets Act* and the *Digital Services Act*, drafts of which are expected to be published by the end of 2020.[275]

A "Digital Markets Act"

Digital Gatekeepers A Digital Markets Act is expected to have two main parts, one setting new rules for "digital gatekeepers", and another providing for a new ex ante competition tool.[276]

"Digital gatekeepers" are considered to be large online platforms controlling access to critical online activities and acting as gatekeepers between businesses and consumers. These platforms typically hold vast amounts of data and, in some cases, very large customer bases. Even when they are not dominant under EU competition law, the EC considers that they have a systemic ability to strengthen and expand their gatekeeping roles, including in other ecosystems, to raise barriers to entry and expansion for rivals, and to increase their hold and leverage over their users.[277]

[273] With thanks to Georgia Tzifa. EC Press Release, "Antitrust: Commission consults stakeholders on a possible new competition tool" (2 June 2020), available at: *https://ec.europa.eu/commission/presscorner/detail/en/ip_20_977* [Accessed 6 February 2021].

[274] See the relevant webpages for the consultations: European Commission, "Digital Services Act—deepening the internal market and clarifying responsibilities for digital services", available at: *https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital-Services-Act-deepening-the-Internal-Market-and-clarifying-responsibilities-for-digital-services/public-consultation* and European Commission, "Single Market—new complementary tool to strengthen competition enforcement", available at: *https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool/public-consultation* [Both accessed 6 February 2021].

[275] L. Crofts, M. Newman and N. Hirst, "Plans to shackle Big Tech face headwinds inside EU Commission", MLex, (6 November 2020).

[276] European Commission, "Speech by M. Vestager: Building trust in technology", (EPC Webinar—Digital Clearinghouse, 29 October 2020), available at: *https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-executive-vice-president-margrethe-vestager-building-trust-technology_en* [Accessed 6 February 2021].

[277] See the combined roadmap/inception impact assessment for the Digital Services Act package, European Commission, "Digital Services Act—deepening the internal market and clarifying responsibilities for digital services" (4 June 2020), available at: *https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital*

The EC's stated aim was, therefore, the development of ex ante rules to ensure that competition can still take place in markets characterised by large platforms acting as gatekeepers.[278]

According to recent press reports, the Digital Markets Act will include a list of forbidden practices for digital gatekeepers ("a blacklist"). It has been suggested that the blacklist may include, among others, the following practices:

- *exclusive use of data*: digital gatekeepers shall not use data generated/collected on the platform for their own commercial activities, unless such data is also provided to (actual or potential) competitors;
- *preferential ranking* of the digital gatekeepers products/services in online search engines or online intermediation services;
- *exclusive pre-installation* of gatekeepers' own applications on hardware systems; and
- *contractual, technical, or other measures* which prevent users from uninstalling any pre-installed apps.[279]

Apart from the blacklist, it has been suggested that the Digital Markets Act will also provide for certain "greylisted" practices. These will not be forbidden, but will be subject to greater regulatory oversight by the competent competition law authorities. For example, digital gatekeepers shall not prevent third-party sellers from accessing essential information on customers. They shall also not prevent hardware manufacturers from providing their customers and business users with a choice of options for applications/services to be used on/accessed via the hardware.[280]

The EC aims to combine these restrictions with a case-by-case approach. Therefore, it may be that the blacklist will apply to all digital gatekeepers, whereas the greylist only to some of them. Another question in that connection refers to the criteria by which digital gatekeepers will be identified (e.g. should it be number of users, business contracts, market share, turnover etc.). All this remains to be seen once the draft legislation is published.[281]

A New Ex Ante Competition Tool As mentioned above, the Digital Markets Act is also expected to provide for a new *ex ante* competition tool. In various preparatory documents, the EC explained that its enforcement experience, as well as a body of economic evidence, suggest that current competition law rules (which

-Services-Act-deepening-the-Internal-Market-and-clarifying-responsibilities-for-digital-services and the EC Press Release, "Commission launches consultation to seek views on Digital Services Act package" (2 June 2020), available at: *https://ec.europa.eu/commission/presscorner/detail/en/IP_20_962* [Both accessed 6 February 2021].

[278] European Commission, "Digital Services Act—deepening the internal market and clarifying responsibilities for digital services" (4 June 2020) and the EC Press Release, "Commission launches consultation to seek views on Digital Services Act package" (2 June 2020).

[279] Samuel Stolton, "Commission mulls restrictions on platform data use in Digital Services Act", *Euractiv* (30 September 2020), available at: *https://www.euractiv.com/section/digital/news/commission-mulls-restrictions-on-platform-data-use-in-digital-services-act/* [Accessed 6 February 2021].

[280] Stolton, "Commission Mulls Restrictions on Platform Data Use in Digital Services Act" (30 September 2020).

[281] Stolton, "Commission Mulls Restrictions on Platform Data Use in Digital Services Act" (30 September 2020). See also Damien Geradin, "The Digital Markets Act : How should ex ante rules look like?", *The Platform Law Blog* (23 October 2020), available at: *https://theplatformlaw.blog/2020/10/23/the-digital-markets-act-how-should-ex-ante-rules-look-like/* [Accessed 6 February 2021].

permit intervention only in cases of competition law infringement) cannot satisfactorily deal with certain structural competition problems.

This is particularly the case for "tipping" markets, monopolisation strategies by non-dominant companies with market power, parallel leveraging strategies by dominant companies into multiple adjacent markets, and various types of tacit collusion (e.g. tacit collusion in increasingly concentrated markets, even short of individual market power, algorithmic collusion, etc.).[282]

The EC is therefore developing a new *ex ante* competition tool, which would allow it to:

- identify structural competition problems in a market/sector, which cannot be remedied by competitive forces nor by conventional competition law enforcement;
- even in the absence of any competition law infringement, impose structural or behavioural remedies that the EC deems fit to address the concerns for the future.[283]

It remains to be seen exactly what type of remedies the new provisions might involve. For example, whether they might include remedies such as an obligation to abstain from certain commercial behaviour or require a divestiture, or the grant of access to key infrastructure or inputs. The EC's consultation also referred to "hybrid remedies", that is, remedies combining behavioural and structural elements.[284]

In any event, the EC would make no findings of infringement. Therefore, an EC decision under these provisions would not provide a basis for the imposition of fines, or for subsequent damages claims by private parties.[285]

The contemplated legislation on the new ex ante competition tool most closely mirrors the UK market investigations rules. These have been in place since the early 2000s and are specifically aimed at addressing harm that is already happening due to structural market failures. Under these rules, the Competition and Markets Authority (CMA) can conduct market investigations and order structural changes to address a lack of competition, without separate investigations into market operators. The CMA has conducted some 20 market investigations to date.[286]

[282] EC Press Release, "Antitrust: Commission consults stakeholders on a possible new competition tool" (2 June 2020), available at: *https://ec.europa.eu/commission/presscorner/detail/en/ip_20_977* [Accessed 6 February 2021] and European Commission, "Digital Services Act—deepening the internal market and clarifying responsibilities for digital services" (4 June 2020).

[283] EC Press Release, "Antitrust: Commission consults stakeholders on a possible new competition tool" (2 June 2020) and European Commission, "Digital Services Act—deepening the internal market and clarifying responsibilities for digital services" (4 June 2020).

[284] Question 31 of the EC's questionnaire, "Single Market—new complementary tool to strengthen competition enforcement" which was available online until 8 September 2020 at: *https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool* [Accessed 6 February 2021].

[285] EC Press Release, "Antitrust: Commission consults stakeholders on a possible new competition tool" (2 June 2020) and European Commission, "Digital Services Act—deepening the internal market and clarifying responsibilities for digital services" (4 June 2020).

[286] CMA, "Market Studies and Market Investigations: Supplemental guidance on the CMA's approach", (January 2014 (revised July 2017)), available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/624706/cma3-markets-supplemental-guidance-updated-june-2017.pdf* [Accessed 6 February 2021].

A "Digital Services Act"

The second piece of legislation that the EC is working on is the "Digital Services Act". The current legal framework for digital services has remained unchanged since the adoption of the e-Commerce Directive in 2000.[287] However, technological developments and the rise of platforms, e-commerce and new business models in the digital world have made the EC consider that it is time to develop a more modern legal framework, while respecting the basic principles of the e-Commerce Directive.[288]

The EC's aim, through the Digital Services Act, is to set out and harmonise the regulatory responsibilities of digital platforms, in order to address the risks faced by their users and protect users' rights.

The draft legislation in preparation is expected to focus on the following points:

- **User safety:**

  The EC aims to protect users from illegal activities (e.g. dangerous products, scams, hate speech) and, potentially, also from harmful content (e.g. fake news, harmful content to minors). It is unclear what type of provisions will be included in the Act, but the EC has explored, at various stages, possible obligations for online platforms such as reporting mechanisms, moderation teams, transparency and information requirements, access to platforms' data for trusted researchers, auditing systems, human oversight of automated tools, and third-party insight (e.g. by academics) of content moderation systems, etc.

- **Liability:**

  The e-commerce Directive prohibits Member States from imposing on intermediary service providers general monitoring obligations or general obligations to seek facts/circumstances of illegal activities conducted on their service by their users.[289] The EC will consider whether this is still appropriate, in light of recent and current developments in the digital world.

- **Transparency:**

  The EC is expected to propose new rules to increase transparency online. Particular points of interest are online advertising and smart contracts (e.g. validity, applicable law).

[287] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce; e-Commerce Directive), [2000] OJ L 178/1.

[288] European Commission, "Digital Services Act—deepening the internal market and clarifying responsibilities for digital services" (4 June 2020) and the EC Press Release, "Commission launches consultation to seek views on Digital Services Act package", (2 June 2020).

[289] See art.15(1) of the e-Commerce Directive.

- **Platform workers:**

  The aim here is to identify areas of improvement as regards the situation of platform workers (e.g. health and safety considerations) and to propose rules to that effect.

- **Governance:**

  In other words, what governance structure may be required to complete the single market for digital services and how could regulators work more effectively?[290]

So, the EC is moving from last year's "reports" phase to proposals.

Competition Law and Foreign Subsidies

In June 2020, the EC issued a White Paper proposing three new regulatory tools to tackle distortive effects that may be caused by foreign subsidies in the EU Single Market ("White Paper").[291] The White Paper explains that, although the EU has developed elaborate rules to tackle such distortions, it is thought that the existing rules of EU merger control, state aid, public procurement and trade policy are insufficient to ensure a level playing field,

In the context of competition law, the key point is that the White Paper proposes a new regulatory process that will ensure that foreign subsidies do not confer an unfair benefit on their recipients when acquiring EU companies, either directly by linking a subsidy to a given acquisition or indirectly by de facto increasing the financial strength of the acquirer.

The EC envisages a compulsory notification mechanism, that would allow *ex ante* review of a planned acquisition, above a given threshold, by a competent authority. The review would be limited to financial contributions from non-EU countries exceeding a minimum amount. Transactions could not be closed whilst the preliminary, or, if needed, the in-depth review is pending.

Lastly, the EC could apply an "EU Interest Test", allowing for a balancing exercise between the distortive impacts of the subsidy and the positive outcomes of the transaction. If the overall conclusion is that the financial contribution is distortive, then either: (i) the acquirer would have to accept commitments that effectively remedy the distortion; or (ii) the acquisition would be prohibited.

This process would be coordinated with the EC merger control rules.

Together with the recent developments in foreign direct investment laws noted above, these ideas are broadening the scope of potential review for international transactions considerably.

[290] European Commission, "Digital Services Act—deepening the internal market and clarifying responsibilities for digital services" (4 June 2020) and the EC Press Release, "Commission launches consultation to seek views on Digital Services Act package", (2 June 2020). See also Samuel Stolton, "EU Commission to introduce sanctions regime for illegal content in Digital Services Act", *Euractiv* (4 November 2020), available at: *https://www.euractiv.com/section/digital/news/eu-commission-to-introduce-sanctions-regime-for-illegal-content-in-digital-services-act/* [Accessed 6 February 2021].

[291] With thanks to Marilena Nteve. EC Press Release IP/20/1070, 17 June 2020. European Commission, White Paper on levelling the playing field as regards foreign subsidies (17 June 2020), COM(2020) 253 final. See *https://ec.europa.eu/competition/international/overview/foreign_subsidies_white_paper.pdf* [Accessed 6 February 2021].